F.C.C. 73-537

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Complaint of
ACCURACY IN MEDIA, INC.
against
NATIONAL BROADCASTING CO., INC.

ORDER

(Adopted May 16, 1973; Released May 21, 1973)

BY THE COMMISSION: COMMISSIONER ROBERT E. LEE CONCURRING AND ISSUING A STATEMENT; COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART AND ISSUING A STATEMENT IN WHICH COMMISSIONER HOOKS JOINS.

1. The Commission has before it an Application for Review filed on March 6, 1973 by Accuracy in Media, Inc. of the ruling of the Broadcast Bureau of February 27, 1973.

2. We have examined the pleadings herein and believe that the Bureau's ruling was correct. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules and Regulations, the Application for Review IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

CONCURRING STATEMENT OF COMMISSIONER ROBERT E. LEE

Today, I concurred with my colleagues, with the understanding that the Commission will expeditiously review, and hopefully revise, the fairness doctrine criteria that now must be met by all interested parties. Such revisions should be designed with the objective of easing the "burdens" of all parties involved in a fairness doctrine controversy.

STATEMENT OF COMMISSIONER JOHNSON CONCURRING IN PART AND DISSENTING IN PART IN WHICH COMMISSIONER HOOKS JOINS

While I concur in the disposition of this case, I disagree with the majority finding that complainants have not presented a controversial issue of public importance.

F.C.C. 73-553

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMERICAN TRUCKING ASSOCIATION, INC., WASHINGTON, D.C., COMPLAINANT *vs.* AMERICAN TELEPHONE & TELEGRAPH CO., NEW YORK, N.Y., DEFENDANT	Docket No. 19746

MEMORANDUM OPINION AND ORDER

(Adopted May 23, 1973; Released May 29, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND REID CONCURRING IN THE RESULT.

1. The Commission has before it an amended formal complaint filed by theAmerican Trucking Association, Inc. (ATA) on September 1, 1972 questioning the lawfulness of provisions in American Telephone and Telegraph Company's (AT&T) Private Line Service Tariff (Tariff F.C.C. No. 260) which allows a particular customer—Aeronautical Radio, Inc. (ARINC)[1]—to order private line service on behalf of itself and air transport carriers. The National Association of Motor Bus Owners (NAMBO) filed a statement in support of ATA's complaint on September 16, 1972 and AT&T answered the amended complaint on October 16, 1972.

2. Section 2.2.1 of AT&T's 260 generally requires that the interstate private line services provided by the telephone companies to persons ordering such services shall be used "for the transmission of communications to or from the *customer* and relating directly to the *customer's business*" (our emphasis) and Section 2.2.3 of the same tariff prohibits the "re-sale" of such services or the use thereof to handle communications "for others." However, certain exceptions to these particular requirements are spelled out in the tariff. One of these exceptions is expressed in subsection (G) of Section 2.2.1 which specifically permits private line services to be used:

> "For the transmission of communications to, from, within and between air carriers, where the customer is an aeronautical communications company licensed under the Aviation Services rules of the Commission to operate stations in the aeronautical mobile and fixed services."

It is this particular subsection (and related tariff provisions) to which the complaint is addressed because ARINC is the only entity that fits this exemption and complainant contends that the results are that air carriers are given certain preferences and privileges that are denied to

[1] ARINC is a Delaware stock corporation operated to provide communications facilities for the conduct of air carrier and other aircraft operations under by-laws that provide for operation on a non-profit basis.

motor truck and other carriers of passengers and property (i.e. buses and railroads) that compete with the air carriers.

3. It is true that subsection (G) of Section 2.2.1 of AT&T's private line service tariffs has the effect of extending to ARINC and the airlines favorable treatment that is denied to other transportation carriers. There are at least six manifestations of such preferential treatment. First, subsection (G) permits ARINC to obtain private line services from the telephone companies for use by itself or by the individual airlines or groups of airlines without complying with the usual tariff requirement (2.2.1(A)) that all such services must be used to transmit communications *to or from ARINC itself.* (Our emphasis.) For example, ARINC, under this exemption, may order private line services between points on a single airline or between points on different airlines or between points on different airlines or between points on any airline and points off of any airline (e.g., government agencies, airframe manufacturers, etc.), without such private line facilities being used to handle communications *to or from ARINC.*

4. Second, subsection (G) permits ARINC to obtain private line services for itself or the airlines, without complying with the usual tariff requirement (See 2.2.1(A)) that all communications over such services must relate *directly to ARINC's* business. Thus, communications handled over any private line facilities that may be ordered by ARINC, no matter where such facilities may be located, may be used to handle communications that relate to any business, without any tariff limitation whatsoever on the nature of the business so handled over such facilities.

5. Third, subsection (G), in conjunction with language in Section 2.2.3 of the tariff, permits ARINC to obtain private line services for itself and the airlines without complying with a general prohibition in the tariff that such services *shall not be used for any purpose for which a payment or other compensation shall be received by either the customer or any authorized or joint user.* Thus, either ARINC or the airlines may, as far as AT&T's tariff is concerned, receive payment or other compensation in any amounts whatsoever from any entity with respect to any use of such private line facilities.

6. Fourth, subsection (G), in conjunction with language in Section 2.2.3, permits ARINC to avoid compliance with another usual tariff requirement that private line services may not be used *in the collection, transmission or delivery of any communications for others.* Thus, so far as the tariff is concerned, ARINC and the airlines are free to use these private line services to handle communications of any persons without limitation and, as heretofore indicated, to receive any compensation or payment therefor.

7. Fifth, subsection (G), in conjunction with a proviso in Section 2.5, permits ARINC to be a customer of the telephone company for private line facilities used by ARINC for itself or for the airlines without complying with another usual tariff requirement that *no one may be a customer for a private line service who does not have a communications requirement of his own for its use.* Under this exemption, ARINC may be a customer of AT&T to order any and all private line facilities for the airlines irrespective of whether ARINC itself has any need or use for such facilities.

8. Sixth, on the basis of the foregoing favorable tariff exemptions AT&T has followed the practice of permitting ARINC to order large volumes of private line service channels throughout the United States for itself and for the air carriers and thereby obtain the substantial *Telpak rate discount* on such services for the benefit of the air carriers.

9. As heretofore stated, complainant alleges, and AT&T concedes, that the motor truck carriers have been denied, in all respects, the same favorable treatment that has been extended by the telephone companies to the air transport industry. Moreover, it appears clear that all other surface transportation carriers, such as railroads and buses, have also been denied such treatment. ATA emphasizes that it does not question the validity of the exceptions extended to ARINC and the air lines and ATA alleges that it does not want to do anything to deprive the airline industry of this favorable pattern of treatment. However, ATA contends that it is a violation of Section 202(a) of the Act for AT&T to deny the same treatment to surface carriers that compete with the airlines and ATA requests that we direct AT&T to revise its tariffs to permit such treatment for all surface carriers and that AT&T be required to pay forfeitures provided for under Section 202(c) of the Act for violations of Section 202(a).

10. In its December, 1971, reply to ATA's earlier informal complaint,[2] AT&T explained its rationale for not extending to ATA and its members the same tariff and rate treatment accorded to ARINC and the airlines. AT&T stated that:

> "The reasonableness of the tariff provision in question rests upon a judgment that ARINC has unique operational characteristics and responsibilities which can be met most efficiently by permitting it, as a customer, to order and administer the communications requirements of the carriers which it serves."

AT&T added that these preferential tariff provisions were "not filed for the purpose of conferring any special rate advantage on the airline industry." In reaching its conclusion, AT&T placed substantial reliance on an early Commission decision which stated that:

> ". . . safety of life and property in the air is the principal purpose for which [ARINC] was organized and is operating under its existing declaration of policy. . . . Coordination [of radio and wire facilities] through a single agency will tend to promote the safety of life and property in the air." [3]

In its responsive pleadings to ATA's amended formal complaint, AT&T defends its tariff and rate treatment of ARINC and the airlines for the same reasons set forth above in responding to ATA's informal complaint.

11. We are of the opinion that the ATA complaint raises substantial questions as to whether there is adequate justification under the Communications Act for the aforementioned tariff regulations insofar as they permit AT&T to extend the aforementioned tariff and rate treatment to ARINC and the airlines and deny the same treatment (a) to ATA and motor truck carriers, (b) to other transportation carriers in competition with the airlines, and (c) to most other private line users (e.g. members of the National Retail Merchants Association) who might wish to group their service requirements to obtain the bene-

[2] After ATA received no satisfaction on its informal complaint, it filed the instant formal complaint.

[3] *Aeronautical Radio, Inc.* v. *American Telephone and Telegraph Company*, 4 F.C.C. 155, 162–3 (1937).

fits accorded to the airline industry. In addition to these tariff provisions challenged by complainant, there are other provisions wherein the telephone company undertakes to provide all or some of the same privileges to other entities, such as corporate conglomerates (2.2.1(e)) stock exchanges and members (2.2.1(e)), electric power pools (2.2.1 (f)) and state and local governments (2.2.1(g)). Since these privileges appear to be denied, in whole or in part, to other users generally, including complainant's members, we believe that the same questions of lawfulness are raised as to such provisions.

12. With respect to the airlines, a question is raised as to whether the different tariff treatment is warranted on the basis of AT&T's contention that we decided in 1937 that there were unique operational characteristics and responsibilities attributable to ARINC warranting such disparate treatment. 4 FCC 155 (1937) The issue before us in 1937 was whether ARINC was entitled to obtain private line teletypewriter service from AT&T as a customer of AT&T and to use such services *for ARINC's own use and benefit* and for the transmission of messages by ARINC in which ARINC *had a direct interest*. 4 FCC 155; 164–165 (1937) We expressly held that:

> "We desire to make it clear that, so far as this decision is concerned, we are merely passing upon complainant's right under defendants' existing tariff to a private line teletypewriter service *for its own use* in handling such communications as the record disclosed *it proposes to handle* and which relates to the safety of life and property in the air." (our emphasis) 4 FCC 155; 166 (1937)

Accordingly, our actual holding in 1937 was that ARINC could obtain private line services from AT&T for ARINC itself to transmit messages relating to safety of life and property in which ARINC had a direct interest even though such transmissions were to be for the benefit of the airlines. However, the issue raised by the ATA complaint is whether ARINC may obtain private line services not only for its own use but also for the use of the airlines themselves and obtain for itself and the airlines all of the privileges allowed by the tariff exceptions referred to above, which privileges are denied to the competitors of the airlines who claim that they also have a need to transmit communications which relate to safety of life and property. Furthermore, the changes that have occurred in ARINC's operations since 1937 raise questions as to whether and to what extent our decision in 1937 has applicability to present-day facts and circumstances.

13. In view of the foregoing, we conclude that the lawfulness issues presented by ATA's complaint should be resolved on the basis of an evidentiary hearing record. Moreover, since the same kind of tariff exemptions apply, in whole or in part, to corporate conglomerates, stock exchanges and members, electric power pools and state and local governments, we believe that the lawfulness of those provisions should also be investigated at the same time, on our own motion.

14. We should make clear that the scope of the issues to be investigated in this proceeding will be limited. We are concerned in this proceeding with resolving the basic question of whether or not the tariff provisions referred to above constitute unlawful discrimination or preferences within the meaning of Section 202(a) of the Act. Therefore, we are not concerned in this proceeding with questions as to the justness or reasonableness of Telpak rates or of any of the aforemen-

tioned general tariff provisions prohibiting "re-sale", third party traffic or receipt of compensation, except insofar as consideration of the justness and reasonableness of such general prohibitions may be relevant to a resolution of the foregoing basic issue. The lawfulness of these tariff restrictions, *per se*, is a matter that we are considering taking up in separate proceedings and the lawfulness of the Telpak rates is being considered in a separate docket (No. 18128). In summary, the hearing we are ordering herein is to determine whether the above-described differences in rate and tariff treatment that are extended to the airlines, corporate conglomerates, stock exchange members, and state and local governments, constitute unlawful discrimination or preferences within the meaning of Section 202(a) of the Act and, if so, what remedial action we should take to remove such unlawfulness, including among other possible actions, whether we should prescribe new or revised tariff provisions that would be just, fair and reasonable, as provided in Section 205 of the Act.

15. Accordingly, IT IS ORDERED, That, pursuant to Sections 4(i), 201, 202, 205, 208 and 403 of the Communications Act, an investigation is hereby instituted into the lawfulness of the aforementioned provisions of Sections 2.2.1, 2.2.3 and 2.5 of AT&T's Tariff F.C.C. No. 260 insofar as these provisions accord rate or tariff treatment to the airlines, corporate conglomerates, stock exchanges and their members, electric power pools, local and state governments, or others, that is denied in whole or in part to complainant or to any other person or persons;

16. IT IS FURTHER ORDERED, That the proceeding shall include inquiry into the following issues:

(1) Whether such tariff provisions, insofar as they provide for the aforementioned different rate or tariff treatment, constitute, in whole or in part, unjust or unreasonable discrimination, or subject any person or class of persons to undue or unreasonable prejudice or disadvantage, or give any undue or unreasonable preference or advantage to any person or class of persons, within the meaning of Section 202(a) of the Communications Act; and

(2) If the Commission should find that any of these provisions is in contravention of Section 202(a), what action the Commission should take to remove any such unlawfulness found to exist, including the question of whether the Commission, pursuant to Section 205 of the Act, should prescribe new or revised tariff changes that would be just, fair, and reasonable.

17. IT IS FURTHER ORDERED, That defendant's Motion to Dismiss IS DENIED.[4]

18. IT IS FURTHER ORDERED, That, the hearing in this proceeding shall commence at the Commission offices in Washington, D.C. at a time to be specified by the presiding Administrative Law Judge; and that such Administrative Law Judge shall, upon the closing of the record, prepare an initial decision which shall be subject to the submittal of exceptions and requests for oral argument as provided in 47 C.F.R. 1.276 and 1.277, after which the Commission shall issue its decision as provided in 47 C.F.R. 1.282 and that the trial staff of the Common Carrier Bureau shall be separated both from the Commission and from the Administrative Law Judge;

[4] Further consideration is being given to the "Motion to Consolidate or, in the alternative, motion to hold complaint in abeyance" filed by Microwave Communications, Inc. (MCI) on November 7, 1972; however, we believe that our action herein is in accord with MCI's suggestion that there could be a "spin-off" of the single user issue for early resolution.

19. IT IS FURTHER ORDERED, That AT&T and the other Bell System operating companies and all other carriers listed as concurring carriers in AT&T's Tariff F.C.C. No. 260, are hereby named PARTIES RESPONDENTS herein, and complainant is permitted to intervene as a PARTY INTERVENOR upon written notice filed within 15 days after the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-551

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of

AMENDMENT OF PARTS 2 AND 91 OF THE COMMISSION'S RULES TO PERMIT MEDICAL TELEMETRY AND OTHER LOW-POWER USES OF OFFSET FREQUENCIES IN THE BUSINESS RADIO SERVICE

Docket No. 19478
RM-1842

FIRST REPORT AND ORDER

(Adopted May 23, 1973; Released May 25, 1973)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND WILEY CONCURRING IN THE RESULT.

1. On March 28, 1972, the Commission issued a Notice of Inquiry and Notice of Proposed Rule Making in the above-entitled matter which was published in the Federal Register on April 4, 1972, 37 FR 6757. Comments were filed by the Central Committee on Communications Facilities of the American Petroleum Institute (API); Gary J. Anderson, M.D.; Land Mobile Communications Section of the Communications and Industrial Electronics Division of the Electronic Industries Association (EIA); Hewlett-Packard Company; International Telephone and Telegraph Corporation Mobile Communications (ITT); National Association of Business and Educational Radio, Inc. (NABER); Reach Electronics, Inc.; Spacelabs, Inc.; United Airlines, Inc. (United) and the Utilities Telecommunications Council (UTC). Aeronautical Radio, Inc. (ARINC); and Hewlett-Packard Company also submitted reply comments.

2. The Notice of Inquiry and Notice of Proposed Rule Making sought comments on the desirability of amending the Rules governing the Business Radio Service to permit additional uses of "offset" frequency techniques in the band 460–470 MHz. In this band, assignments are spaced every 25 kHz; and offset assignments, where made, are 12.5 kHz from the listed frequencies. Use of offset frequencies is restricted to low-power mobile installations where the area of operation is within the confines of an industrial complex. It appeared that additional uses, particularly in-hospital, bio-medical telemetry, could be accommodated on these frequencies and our Notice of Inquiry contemplated the development of information regarding this and other low-power communication requirements which might be met through the use of the offset frequency assignments.

3. The two-fold nature of the Notice; i.e., the proposal to permit in-hospital telemetry and the inquiry about other operations which could be accommodated on the offset frequencies, has resulted in conflicting comments. Because it is our belief that a comprehensive exami-

nation of the proposals submitted concerning additional low-power operations of the offset frequencies, will unduly delay a decision for their use for low-power, bio-medical telemetry purposes within hospitals, we are issuing a First Report and Order limited to this aspect of the proposal. The proceeding will remain open for future consideration of other low-power uses that can be accommodated on these frequencies.

4. The in-hospital cardiac use contemplated in our Notice generally involves small telementry transmitters carried by ambulatory patients which transmit certain physiological data to a receiver-monitor. The comments agreed that this was a valid communications requirement which justifies frequency allocation. However, one of the issues raised in our Inquiry was whether these operations could reasonably co-exist with other co-channel and adjacent channel operations conducted in the vicinity of hospitals and which use higher transmitter powers.

5. The proposal to accommodate low-power, in-hospital telementry was predicated on our belief that the possibility of co-channel interference to the medical telemetry unit would be remote because of the shielding available within the hospital building. Adjacent channel interference was not believed to be a problem because of the combination of factors necessary to produce harmful interference. Our assumptions were contested by a number of parties. For example, API states, ". . . use of such telementry facilities on the upper floors of hospitals or medical centers could result in serious interference being received from nearby industrial systems, because the medical system receivers would be provided with visibility far exceeding that which was anticipated when Section 91.554(c) was adopted . . ." [1] Adjacent channel interference was also thought to be a problem. EIA states, "The channels which sandwich the 12.5 kHz spaced offset frequencies permit powers in the area of 100 watts, or 1,000 times that of the proposed bio-medical systems. . . ." and suggested that "the potential for dangerous and destructive interference [to in-hospital telemetry systems] is substantially greater on these frequencies than on those provided for this purpose in the Commission's March 8, 1972, Report and Order in Docket 19231 (VHF–TV sharing.)" [2]

6. In reply comments, Hewlett-Packard, the petitioner in this proceeding, did not contest the possibility of interference, but argues that it may be minimized through the use of selective modulation and filtering techniques and alarm circuitry.[3] Further, it suggests, as a possibility for minimizing adjacent channel interference, limiting in-hospital telemetry operations to the offset frequencies located within the band 460.650–460.875 MHz, since regularly assigned frequencies within this band are primarily available at air terminals for comparatively low-power operations.

7. ITT also considered adjacent channel interference and states:

[1] Offset frequencies became available as a result of channel-splitting action in Docket 13847 (33 FR 3114).
[2] Rules adopted in the proceeding in Docket No. 19231 permit low-power medical telemetry operation on selected VHF–TV channels under the provisions of Part 15 of our Rules.
[3] Alarm circuitry indicates an interference condition which might result in an inaccurate display of a patient's condition necessitating direct observation of the patient until the interference condition passes.

"The fixed telemetry receiver can be made highly stable and highly selective because there is no size or power consumption restriction. Also, the receiving antenna can be a radiating cable (otherwise known as leaky line) whose characteristics are: to have good pickup of signals close-in, but have attenuated response to far-field signals. All of the above technical factors are favorable to medical telemetry systems co-existing with adjacent channel (12.5 kHz away) business radio stations without mutual interference."

In addition, ITT notes medical telemetry transmitters are exposed to a very narrow temperature range (as it is carried next to a patient's body) resulting in greater transmitter stability than would be expected in transmitters used for voice operations in industrial complexes which are subject to temperatures ranging from −30°C to +50°C. Further, voice transmissions require greater bandwidth than bio-medical telemetry transmissions, necessitating the use of a receiver with less selectivity than could be employed for bio-medical telemetry reception.

8. ITT's and Hewlett-Packard's arguments are persuasive, and we tend to believe that the potential for co- and adjacent channel interference to well designed operations on offset frequencies may not be as significant as suggested by some of the other comments. However, we did not receive sufficient data to enable us to determine with reasonable assurance the precise conditions under which offset frequencies may be used without serious interference problems and; as we have said, we will pursue this issue further in this proceeding.

9. Meanwhile, we agree with Hewlett-Packard that in-hospital, low-power telemetry systems can be accommodated in the interim on the offset frequencies located between the frequencies allocated in the 460–470 MHz band for land mobile operations in air terminals. This would make available a total of 18 frequencies and would accommodate the reasonable requirements of many hospitals for the time being. As pointed out by Hewlett-Packard, in the 87 largest urban areas, the aviation terminal frequencies are used within known areas (the general confines of air terminals) with relatively low power, i.e., 20 watts for base stations and 3 watts for mobile stations. The requirement for multi-frequency systems is related to hospital size and facilities, and access to these frequencies by hospitals within these areas should be relatively interference free. Outside the 87 largest urban areas where the aviation terminal frequencies may be used for land mobile operations employing up to 180 watts power, the interference potential to 12.5 kHz offset frequencies in hospitals is considerably greater. In these areas, hospitals will need a small number of frequencies; and we expect this requirement can be accommodated on the 8 low-power business channels which are limited to 3 watts power and are not adjacent to frequencies on which higher powers are permitted. Accordingly, we believe that well-designed, in-hospital telemetry systems on the offset frequencies can be expected to operate there without significant adjacent interference problems. Specifically, therefore, we will amend our rules to permit one-way, non-voice bio-medical telemetry operations on the 18, 12.5 kHz offset frequencies located within the bands 460.650–460.875 and 465.650–465.875 MHz in hospitals, medical, and convalescent centers. Further, to minimize co-channel interference possibilities, we are restricting for the time being all new operations on these offsets to bio-medical telemetry operations. Existing systems cur-

rently utilizing these offset frequencies will continue to be authorized; but no new non-medical telemetry operations will be permitted.

10. In reaching our conclusion to permit limited in-hospital, biomedical telemetry on the 460–470 MHz offset frequencies, we considered, among other matters, the argument advanced by Spacelabs, Inc., to the effect that operation of the radio telemetry units near heart pacemakers could cause the pacemaker to function erratically and could harm the patient on which it (the pacemaker) is attached. The Commission appreciates Spacelab's concern. We note, however, Hewlett-Packard's reply comment that the:

"Susceptibility of a pacemaker to radio frequency radiation is not peculiar to the frequencies involved in this proceeding. Medical te'emetry is only one of many sources of radio frequency radiation which may interfere with the proper operation of a pacemaker. Because medical te'emetry units are operated in close proximity with pacemakers, it has become common clinical practice to evaluate the compatibility of a pacemaker and a medical telemetry unit under actual operating conditions on a patient before the patient is permitted to ambulate."

11. The problem noted by Spacelabs is, as stated by Hewlett-Packard, not limited to the frequencies in the 450–470 MHz band. The U.S. Department of Health, Education, and Welfare, in a publication entitled "Electro-magnetic Radiation Interference with Cardiac Pacemakers," has stated:

". . . pacemaker disfunction has been reported in the vicinity of the following: radio stations, motorcycles, and gaso'ine ignition systems, radar sites, and electric shaver, and a television receiver, as well as an electric mixer. This brief list is not intended to be all inclusive, but serves to point out the wide variety of potential interference sources presented daily to the pacemaker wearer. *Physicians have been alerted to the potential interference from electronic products through the available literature; and they, in turn, have been able to advise their pacemaker patients on possible problems.*" (Emphasis added)

Because awareness of the problem of interference to cardiac pacemakers is well publicized, the Commission believes the public interest can best be served by complying with Hewlett-Packard's request. It is our belief that this particular interference problem is best dealt with by the medical personnel concerned. Should trouble occur because of interference between the telemetry transmitter installed on a patient and his pacemaker, this effect should be immediately apparent at the monitor. Corrective action can then be taken.

12. Few other items require decision. We see no substantial difference between our proposal to permit 100 milliwatts "output" and 100 milliwatts "radiated" power urged by Hewlett-Packard. Therefore, we will adhere to our original proposal and permit a maximum of 100 milliwatts of output power for bio-medical telemetry units operating on the frequencies in question because it is easier to enforce the power limitation through our type-acceptance program.

13. ARINC suggested that it be allowed to coordinate the selection of the offset frequencies within the air terminal allocation. Since ARINC coordinates the regularly assignable air terminal frequencies, it would probably be logical to allow it to coordinate the offsets, also. However, the National Association of Business and Educational Radio, Inc., has been doing this for applicants using these as well as the other offsets in industrial complexes; and it would be more practical to continue the existing arrangements until the whole question relating to

the use of all of the offset frequencies in the 460–470 MHz band is settled in a subsequent phase of this proceeding.

14. Finally, as urged by Reach Electronics and Hewlett-Packard, we will not impose precise modulation restrictions beyond limiting the use to telemetry and to non-voice techniques.

15. In view of the foregoing, the Commission finds adoption of a rule amendment permitting bio-medical telemetry on the offset frequencies between the air-terminal frequencies in the bands 460.650–460.875 MHz and 465.650–465.875 MHz will serve the public interest. The rule amendment set forth in the attached appendix will, therefore, permit such operations on the specified offsets. Because of the interest displayed by the Federal Government concerning the use of these frequencies for telemetry operations in government hospitals, we are also amending Part 2 of the Commission's Rules to permit this limited government use of these frequencies under the same technical parameters prescribed for nongovernment users.

16. Accordingly, Pursuant to authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, IT IS ORDERED, That effective July 6, 1973, Parts 2 and 91 of the Commission's Rules ARE AMENDED, as shown in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

1. Part 2 of the Commission's Rules is amended as follows:
Section 2.106 is amended by the addition of U.S. footnote 209 to read as follows:

Worldwide		Region 2		United States		Federal Communications Commission				
Band (MHz)	Service	Band (MHz)	Service	Band (MHz)	Allocation	Band (MHz)	Svs.	Class of station	Frequency (MHz)	Nature of services of stations
1	2	3	4	5	6	7	8	9	10	11
*	*			*	*	*	*		*	*
460–470	Fixed. Mobile. Meteorological-satellite. (318A)				(US100) (US209)	460–462.5375	Land mobile.	Base. Land mobile.		Public safety. Industrial. Land transportation.
*	*			*	*	*	*		*	*

* * * * * * * * * * *

US209 The use of frequencies 460.6625, 460.6875, 460.7125, 460.7375, 460.7625, 460.7875, 460.8125, 460.8375, 460.8625, MHz and 465.6625, 465.6875, 465.7125, 465.7375, 465.7625, 465.7875, 465.8125, 465.8375, 465.8625, MHz may be authorized with 100 milliwatts or less output power to Government and non-Government radio stations for one-way, non-voice bio-medical telemetry operations in hospitals, or in medical or convalescent centers.

* * * * * * *

2. Section 91.554(c) is amended, and a new paragraph (d) is added to read as follows:

§ 91.554 Frequencies available.

* * * * * * *

(c) Except for frequencies separated by 12.5 kHz from regularly assigned frequencies in the bands 460.650–460.875 MHz and 465.650–465.875 MHz, low-power mobile stations of 3 watts or less may be assigned any frequency separated by 12.5 kHz from any mobile frequency in the band 450–470 MHz listed in

paragraph (a) of this section. Such station may be used to provide any function of a base, mobile relay, or mobile station; Provided, That all operation is limited to the confines of an industrial complex. When used as a base station or mobile relay, the height of the antenna shall not exceed 20 feet above ground. All operation is subject to the condition that harmful interference is not caused to adjacent mobile operations.

(d) Low-power mobile stations of 100 mw or less output power may be assigned any frequency separated by 12.5 kHz from a regularly assigned frequency in the bands 460.650–460.875 MHz and 465.650–465.875 MHz listed in paragraph (a) of this section, for one-way, non-voice bio-medical telemetry operations in hospitals, or in medical or convalescent centers.

41 F.C.C. 2d

F.C.C. 73-569

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of CHRONICLE BROADCASTING CO. For Renewal of License for Station KRON-TV, San Francisco, Calif.	File No. BRCT-94

MEMORANDUM OPINION AND ORDER

(Adopted May 23, 1973; Released May 30, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it for consideration a Petition to Deny, filed November 1, 1971, by The Committee for Open Media (The Committee), directed against the above-captioned license renewal application of Chronicle Broadcasting Co. (Chronicle), for Station KRON-TV, San Francisco, California.[1]

2. The Committee, in its petition, maintains that Chronicle has failed to comply with the Commission's public file requirements and the fairness doctrine. The Committee also maintains that certain deficiencies exist in Chronicle's handling of public service announcements and public affairs programming. The Committee maintains further that Chronicle has delegated full control over its programming to the National Broadcasting Company.

3. Chronicle, in its comments, characterizes the Committee's petition as deficient because of its untimeliness, its lack of specificity, and the absence of supporting affidavits. Chronicle also submits an affidavit of the President of Chronicle Broadcasting Co., wherein the affiant states that KRON-TV's public file "* * * contains all of the items required by Section 1.526 of the Commission's rules," and that "* * * KRON-TV has no contract arrangement or understanding express or implied with the National Broadcasting Company which provides for optioning of time to that network, which hinders or prevents the station from rejecting network programs it considers unsuitable or substituting a program which in the station's opinion is of greater local or national importance." The Committee, in its reply, reiterates the allegations made in its petition.

4. The Committee's petition to deny will be dismissed. Except for a tabulation regarding public service announcements carried on KRON-

[1] Also before the Commission for consideration are the following related pleadings: (i) Comments of Chronicle Broadcasting Co., filed November 15, 1971; and (ii) The Committee's Reply to Comments, filed November 23, 1971.

TV between October 13 and 19, 1971,[2] the instant petition is notably lacking in the specificity demanded by Section 309(d)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d)(1), and Section 1.580(i) of the Commission's rules, 47 C.F.R. 1.580(i), both of which require that a petition to deny contain "* * * specific allegations of fact * * *" supported by "* * * affidavit of a person or persons with personal knowledge thereof." A glaring example of the pleadings lack of specificity can be found in The Committee's conclusionary statement that Chronicle has "* * * failed to comply with the affirmative obligation enunciated by the Fairness Doctrine * * *" and has otherwise "* * * violated the First Amendment right of free speech and the rights of access included in that right as interpreted in * * *" *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367 (1969), and *Business Executives' Move for Vietnam Peace* v. *F.C.C.*, —— U.S. App. D.C. ——, 450 F. 2d 642 (1970), *cert. granted* —— U.S. —— (1972) (Petition, p. 3; Reply, p. 4). Nowhere, however, are any violations of the fairness doctrine cited, nor has The Committee indicated how Chronicle has violated the public's First Amendment rights. We must note that categorical and nonspecific allegations concerning violations of the fairness doctrine are simply not justifiable before the Commission. On this point we have stated:

> "The fairness doctrine necessarily deals with *specific* controversial issues of public importance, not vague and formless generalities. Here petitioner is silent as to what controversial issues were allegedly involved, what *specific* views were aired and what basis he has for the belief that fairness was not achieved." *National Broadcasting Co.*, 20 F.C.C. 2d 58, 61 (1969). (Emphasis added)

5. Other examples of petitioner's general and conclusory statements can be found in The Committee's assertions that: Chronicle "* * * does not maintain convenient access for the public to see and hear robust discussion on public issues" (Petition, p. 3); KRON–TV's * * * public service programming reaches an audience which is subnormal, roughly five to fifteen per cent of the normal audience" (Petition, p. 4; Reply, p. 5); Chronicle does not provide broad access to a large number of diverse groups, but, instead, limits access to only a small portion of such groups" (Petition, p. 4; Reply, p. 6); Chronicle gives public service announcements sub-normal exposure and "* * * ban[s] and prejudge[s] requests for PSA's on controversial issues on the grounds that such issues, when treated, must be treated in a longer format" (Petition, p. 4; Reply, pp. 6–7); Chronicle programs public service announcements in an irresponsible manner, in that "[a] large number of PSA's broadcast * * * are broadcast too repititiously and tend to ignore current community needs, issues and events" (Petition,

[2] In its petition (Exhibit 6), The Committee lists the number, time periods, and gives a brief description of the public service announcements broadcast by KRON–TV between October 13 and 19, 1971, excluding the period 5:00 to 8:00 p.m., Monday, October 18, 1971. While The Committee may disagree with some of the public service announcements broadcast by KRON–TV, it has failed to make any showing that Chronicle has refused to broadcast such announcements for any organization or group. Further, the access question presented in the *Business Executives' Move for Vietnam Peace* decision, *infra*, is presently before the Supreme Court for consideration and the mandate of the United States Court of Appeals for the District of Columbia Circuit has been stayed pending the Supreme Court's decision. Additionally, the question of whether there is a right of access—at least on a paid basis—for all those wishing to express a viewpoint on a controversial public issue is presently being considered by this Commission in Part IV of its *Fairness Doctrine Inquiry*, 30 F.C.C. 2d 26, 33 (1971).

p. 5; Reply, p. 7); and that Chronicle has "* * * delegated carte blanche control over the greater portion of its broadcast day to NBC * * *" (Petition, p. 5; Reply, p. 7). It is apparent from even a cursory reading of the instant petition that The Committee has failed to state these allegations in the requisite specific, factual form. The Committee has not made any showing that any parties to the petition have in fact obtained personal knowledge of any facts relating to these allged deficiencies in Chronicle's operation of KRON–TV. Instead, the petition is characterized throughout by allegations, opinions and conclusions which are devoid of any facts at all. To merit a hearing under Section 309(e) of the Act, 47 U.S.C. 309(e), a petitioner must "go beyond generalizations and allege some specific instances of injury in the immediate context of * * * [Chronicle's] operations * * *." *Hale* v. *F.C.C.*, 427 F. 2d 556 (D.C. Cir. 1970). The allegation of ultimate, conclusionary facts or mere general allegations on information and belief, supported by general affidavits, are not sufficient. *The Evening Star Broadcasting Co.* (WMAL–TV), 27 F.C.C. 2d 316 (1971), *aff'd sub nom*, *Chuck Stone* v. *F.C.C.*, —— U.S. App. DC ——, 446 F. 2d 316, *petition for rehearing denied*, —— U.S. App. DC ——, 446 F. 2d 331 (1972); S. Rept. No. 690, 86th Cong., 2d Sess., p. 12 (1960). We conclude, therefore, that the petition to deny must be dismissed because of its lack of specificity and the absence of supporting affidavits.

6. One other matter remains for discussion, namely, The Committee's contention that Chronicle's public file is incomplete, since it does not contain any composite week data for the 1968–1971 license period (Petition, p. 2; Reply, pp. 2–4). Chronicle's 1968 application for renewal of KRON–TV's license was designated for evidentiary hearing on March 20, 1969, (*Chronicle Broadcasting Co.*, 16 F.C.C. 2d 882, *reconsideration denied*, 20 F.C.C. 2d 903), and a final decision concerning the issues explored in that hearing was released on May 9, 1973 (*Chronicle Broadcasting Co.*, FCC 73–468). It has been long standing Commission policy that, when an application for renewal of license is designated for hearing, the applicant is not required to file another renewal application for the station until completion of the hearing and the issuance of a final decision on that application.[3] Since a final decision on Chronicle's 1968 renewal application for KRON–TV had not been issued prior to December 1, 1971, the date on which the licenses for broadcast stations located in California were scheduled to expire, Chronicle was not required to file another renewal application in September 1971, when applications for renewal of licenses for California broadcast stations were required to be filed. Chronicle, therefore, was not required to have on file composite week data for the 1968–1971 license term for, under Section 1.526 of the rules, 47 C.F.R. 1.526, licensees are only required to maintain in their public files certain specified information filed with the Commission. We nonetheless recognize that the Commission's procedures in this area may work a hardship on members of the public who want to review a licensee's perform-

[3] See 47 U.S.C. 307(d), which provides that, where an application for renewal of license is designated for evidentiary hearing, the Commission shall continue in effect the station's license pending completion of the hearing and any final determination on the application and the disposition of any petition for rehearing filed pursuant to Section 405 of the Communications Act, 47 U.S.C. 405.

ance during the period its application is in hearing.[4] We are, therefore, considering the possible revision of our policy to require the filing at the station of composite week and related data so as to facilitate any appropriate public participation.[5] In the near future, we will issue a Public Notice concerning any revision in our existing procedures for the guidance of the public and broadcast licensees. As an interim measure, we will require all renewal applicants in a posture similar to Chronicle's to place in their stations' public files the applicable composite week logs for the license period during which their applications for renewal of licenses are in hearing status. Further, while no stigma attaches here to Chronicle, which was and is acting in accordance with long standing Commission procedures, Chronicle will also be requested to place in KRON–TV's public file the station's composite week logs for the 1968–1971 license period.[6]

7. In view of the above, IT IS ORDERED, That the Petition to Deny, filed November 1, 1971, by the Committee for Open Media, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[4] Under the Commission's current procedures, members of the public who want to raise questions concerning a licensee's operation during the period its application for renewal of license is in hearing status, pursuant to Section 1.223 of the rules, 47 C.F.R. 1.223, may file a petition to intervene in the hearing, or, if the hearing record has been closed, a motion to reopen the record. However, it must be recognized that the end of the administrative process cannot be regarded simply as a signal to begin anew pleas to the Commission founded on the allegation of ultimate, conclusionary facts or mere general allegations based on information and belief, supported by general affidavits. As noted above, the instant pleading, even if considered as a motion to reopen the record, must fail because of its pervasive lack of specificity and the absence of supporting affidavits. Only a strong and compelling showing would warrant taking up the matter again after the Commission has completed its administrative hearing process. Clearly, the public interest standard of the Communications Act encompasses both procedural and substantive elements, and orderliness, expedition and finality are ingredients of this public interest policy. See *Valley Telecasting Co., Inc.* v. *Federal Communications Commission*, 118 U.S. App. D.C. 410, 336 F.2d 914.

[5] The Commission has already issued a Notice of Proposed Rule Making in Docket No. 19667, adopted January 4, 1973, released January 8, 1973, wherein we are exploring the question whether to make available for public inspection a licensee's program logs for the entire license period, not only the composite week logs as is now required by Section 1.526 of the rules.

[6] The applicable composite week days, adopted by the Commission on August 12, 1970, are as follows: Sunday, July 12, 1970; Monday, May 25, 1970; Tuesday, January 6, 1970; Wednesday, April 29, 1970; Thursday, February 19, 1970; Friday, November 21, 1969; Saturday, September 27, 1969.

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F.C.C. 73-505

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of FIELD COMMUNICATIONS CORP., ASSIGNOR and KAISER BROADCASTING CO., ASSIGNEE For Assignment of License of Television Station WFLD-TV, Chicago, Ill.	BALCT-483, BALQ-66, and BALTS-330

MAY 9, 1973.

KAISER BROADCASTING CO.,
300 Lakeside Drive,
Oakland, Calif. 94604.

GENTLEMEN: This refers to the application for Commission consent to the voluntary assignment of license for television Station WFLD-TV, Chicago, Illinois from Field Communications Corporation to Kaiser Broadcasting Company (BALCT-483, BALQ-66 and BALTS-330). As noted in the application, the assignee-partnership consists of Kaiser Broadcasting Corp. ("Kaiser") and Field Communications Corporation ("Field"), holding a 77.5% and 22.5% interests, respectively.

As noted in the application, Kaiser is presently the licensee of five UHF television stations plus KBSC-TV, Corona, California (this latter station is not involved in the subject transaction). Also noted is the fact that an assignment application for KBSC-TV has been accepted for filing by the Commission on March 22, 1973 (BALCT-508). Since the Commission this day has granted the subject application (including the form #316 applications for Kaiser's five stations), Kaiser now has a 77.5% interest in six UHF stations plus KBSC-TV for a total of seven UHF stations. It has been pointed out that Mr. George D. Woods is one of seven trustees of the Henry J. Kaiser Family Foundation, 32.25% owner of Kaiser Industries Corp. which is the 100% owner of Kaiser Broadcasting Corp. Mr. Woods through attribution now has an interest in these same seven UHF stations. However, Mr. Woods is also associated with the Ochs Trust as one of its three trustees. The Ochs Trust has voting control of the New York Times, Co., licensee of television Station WREC-TV, Memphis, Tennessee. Therefore a grant of the subject application gives Mr. Woods an interest in eight television stations which is in violation of Section 73.636(a)(2) of the Commission's Rules.

Kaiser Broadcasting Company has requested a one year waiver of Section 73.636(a)(2) so that the subject application could be granted and Mr. Woods continue his above-mentioned interests, pending the sale of KBSC-TV. While we do not think it necessary to require Mr. Woods to sever his connections with either the Kaiser or Ochs Trusts,

we do not believe it would be appropriate to waive our multiple ownership rules, even for a limited period, with Mr. Woods retaining an unrestricted right to participate in matters pertaining to the broadcast interests of both trusts. Consequently, the Commission has determined that a waiver of Section 73.636(a)(2) of the rules for a period of one year or until the KBSC–TV sale is consummated, which ever come first, would serve the public interest. *However*, the grant of the subject applications is made subject to the condition that consummation shall not take place until Mr. Woods has executed a statement, to be submitted to the Commission, whereby he agrees not to participate in any matters relating to the broadcast interests either of the Kaiser Foundation or of the Ochs Trust so long as the above violation of our multiple ownership rules continues to exist. Finally, if for any reason the sale of KBSC–TV has not been consummated within the one year period, you are hereby advised that further waiver requests will not be considered.

Finally, the Commission notes that the subject transaction consists of an exchange of stock between the parties plus assumptions of certain liabilities without any monetary consideration. Due to the lack of monetary consideration, a determination of the Commission's grant fee must be postponed at this time. Therefore, the subject applications are granted conditioned on a future determination of the grant fee. To aid the staff in arriving at the correct grant fee, you are requested to submit relevant data centering on the negotiated values placed on the properties involved in the transaction plus any additional data that would define the actual consideration in monetary terms.

In summation, the subject applications are hereby granted with a limited waiver (as set out above) of Section 73.626(a)(2) of the Commission's Rules. This grant however, is made subject to the conditions: 1) that consummation shall not take place until Mr. George D. Woods has agreed not to participate in any matters pertaining to the broadcast interests either of the Kaiser Foundation or of the Och's trusts; and 2) on a future determination of the grant fee.

Chairman Burch absent; Commissioner Johnson dissenting.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73R-198

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
GILROY BROADCASTING CO., INC., FORT COLLINS, COLO.	Docket No. 19681 File No. BPH-7434
BEEF EMPIRE BROADCASTING CO., FORT COLLINS, COLO.	Docket No. 19682 File No. BPH-7496
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted May 25, 1973; Released May 30, 1973)

BY THE REVIEW BOARD:

1. This proceeding, involving the mutually exclusive applications of Gilroy Broadcasting Company, Inc. (Gilroy) and Beef Empire Broadcasting Company (Beef Empire) for new FM broadcast stations at Fort Collins, Colorado, was designated for hearing by Commission Order FCC 73-155, released February 14, 1973. Now before the Review Board is a petition to enlarge issues, filed March 9, 1973, by Gilroy requesting the addition of the following issue against Beef Empire:

To determine whether Beef Empire Broadcasting Co. has adequately discharged its obligation to ascertain the needs and interests of its entire service area and, if not, the effect of Beef Empire Broadcasting Co.'s failure to ascertain the needs and interests of its service area upon its requisite and/or comparative qualifications.[1]

2. In support of its request, Gilroy charges that Beef Empire consulted only those community leaders living in its proposed city of license, Fort Collins, Colorado, as to their community's problems and needs, whereas, Gilroy avers, Beef Empire was required to contact community leaders in some of the larger outlying communities falling within its coverage contour. Gilroy further charges that Beef Empire's May 19, 1972 amendment to its application, which increased its coverage area by more than 50%, compounded its failure to ascertain community needs since it did not include a survey of community leaders in the "gain area". In addition to the allegation that Beef Empire ignored its ascertainment obligations in the larger communities, Gilroy further alleges that Beef Empire also ignored ascertaining the needs and problems of the smaller communities in its proposed service area which have no local stations and that, therefore, the requested issue should be added. Finally, Gilroy argues that its own *Suburban* surveys were conducted throughout its service area and that therefore the requested issue should be framed so as to permit consideration of whether Gilroy

[1] Also before the Board are the following related pleadings: (a) opposition, filed March 22, 1973, by Beef Empire; (b) Broadcast Bureau's opposition, filed March 22 1973; and (c) reply, filed March 29, 1973 by Gilroy.

should be afforded a comparative preference for its ascertainment efforts.

3. Both Beef Empire and the Broadcast Bureau oppose petitioner's request for addition of the issue. Each party maintains that the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971) (*Primer*) clearly points out that an applicant is not required to ascertain problems in cities or communities that it does not undertake to serve. They both assert that the *Primer* requires only that the applicant provide an explanation why it is not undertaking service to the major communities within its coverage contour. With respect to this particular requirement, both parties maintain that Beef Empire's application and May 19th amendment thereto indicate that it intends to principally serve Fort Collins and that it does not propose to serve the large communities within its coverage contour because those communities already have their own local service. For its part, Beef Empire contends that it did survey people throughout its service area including county officials and others with knowledge of the rural areas. Finally, with respect to Gilroy's contention that the issue be framed to include a comparative efforts inquiry, the Bureau argues that a comparison between Gilroy's and Beef Empire's ascertainment efforts is not warranted since Gilroy failed to make any showing that there was a significant disparity between its ascertainment efforts and those of Beef Empire.

4. In reply, Gilroy charges that both Beef Empire and the Bureau have erroneously interpreted the Commission's requirements in excusing Beef Empire's failure to undertake ascertainment efforts in the outlying areas. It argues that the exception contained in the *Primer* relating to those instances where an ascertainment survey is not necessary cannot be read as authority for ignoring the outlying communities. In any event, Gilroy adds, the issue should be added since Beef Empire only disavowed its intention to serve the major communities lying within the "gain area" resulting from its May 19, 1972 amendment and has never specifically stated that it did not intend to serve the various communities within the coverage contour of its original proposal. Finally, Gilroy points out, the only persons contacted by Beef Empire outside Fort Collins were members of the general public and not community leaders.

5. It is the judgment of the Review Board that the requested *Suburban* issue against Beef Empire is not warranted. Contrary to Gilroy's allegations, the *Primer* explicitly states than an applicant is only expected to ascertain the problems and needs of its community of license and other communities that it undertakes to serve.[2] An applicant must only explain why it will not serve "major communities" falling within its service area. *Primer*, Question and Answer 6. Beef Empire has done just this. It has shown that each of the outlying communities which could reasonably be considered as "major is adequately served

[2] The term "serve" in this context is used "in the sense of programming that is responsive to specific community problems, not in the broader sense of providing programming to any person who receives the station's signal'. *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 658, 21 RR 2d 1507, 1516 (1971).

by two to six aural transmission services.[3] In our view, this is a reasonable justification for not proposing to serve these communities. See *Primer*, 27 FCC 2d 650, 659, 21 RR 2d 1507, 1517 (1971); *Salem Broadcasting Co., Inc.*, 38 FCC 2d 170, 25 RR 2d 955 (1972). As to the areas Beef Empire proposes to serve, its application originally specified service to "Fort Collins and the contiguous rural area" and its May 19, 1972 amendment modified this somewhat to specify service to "principally Fort Collins". It is clear from our examination of Beef Empire's application and successive amendments that it has sufficiently ascertained the needs of Fort Collins, as well as the small surrounding rural communities which it proposes to serve and that its proposed programming has been framed according to those needs. In these circumstances, Gilroy's arguments that Beef Empire has ignored the interests of the small outlying communities must fail.[4] See also *Greenfield Broadcasting Corp.*, 30 FCC 2d 774, 22 RR 2d 497 (1971). Finally, with respect to Gilroy's request for a comparative efforts issue, we note that, other than to contrast its ascertainment efforts with Beef Empire's in communities which Beef Empire indicated that it did not intend to serve, Gilroy fails to allege significant disparities between the ascertainment efforts of the applicants; and we do not believe that a comparative efforts issue is warranted on that basis. *Chapman Radio and Television Co.*, 7 FCC 2d 213, 9 RR 2d 635 (1967); *RKO General, Inc.*, 25 FCC 2d 633, 19 RR 2d 1079 (1970).

6. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed March 9, 1973, by Gilroy Broadcasting Company, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[3] Loveland, pop. 16,220, Stations KLOV–AM and FM; Greeley, pop. 38,902, Stations KYOU, KGRE(FM), KFKA, and KUNC–FM; Longmont, pop. 23,209, Stations KLMO–AM and FM; and Cheyenne, pop. 40,914, Stations KCGO, KFBC, KRAE, KVWO, KFBC–FM and KVWO–FM. The only other communities within Beef Empire's proposed service area with a population of more than 1,500 persons are, according to the applicant, Evans (population 2,570), which is located adjacent to Greeley, and Windsor (population 1,564), which has its own station; and we do not believe that these communities can be regarded as "major" in comparison to Fort Collins, which has a population of 43,337 persons.

[4] With respect to Beef Empire's ascertainment efforts in the outlying rural communities, we refer particularly to its rural listenership survey, Exhibit Number 5, original application; agricultural programming, Exhibit Number 7, original application; ascertained community problems in Windsor and Laporte, amendment of January 22, 1973; and consultations with county leaders, amendment, January 22, 1973.

F.C.C. 73–552

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS INC. Petition Under Section 201(a) of the Communications Act of 1934 for Connection With RCA Global Communications, Inc., To Enable ITT To Provide Telex and Message Telegraph Services With Guam	Docket No. 19684

MEMORANDUM OPINION AND ORDER

(Adopted May 23, 1973; Released May 29, 1973)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it:

(a) A motion to change the issues herein, filed by Western Union International, Inc. on March 12, 1973; [1]

(b) A motion for clarification and enlargement of issues filed by RCA Global Communications, Inc. (RCAGC) on March 19, 1973; and

(c) An opposition to this motion filed by ITT World Communications Inc. (ITTWC) on April 4, 1973.

BACKGROUND

2. On March 29, 1972, a petition was filed by ITTWC, (which operates on Guam only for leased telegraph and leased voice/record services), requesting that the Commission, pursuant to Section 201(a) of the Communications Act of 1934, direct RCAGC to cooperate with ITTWC in establishing an electrical interconnection between RCAGC's telegraph message and telex systems at other United States locations, establishing through routes and charges applicable thereto and the division of such charges; and establishing and providing facilities and regulations for operating such through routes.

RCAGC filed a petition to dismiss or deny ITTWC's petition on May 10, 1972, and ITTWC replied on May 31, 1972. By Memorandum Opinion and Order of February 20, 1973 (FCC 73–144), the Commission instituted an investigation into the matter and directed that a hearing be held on the following issues:

[1] By order of Chief Administrative Law Judge, Arthur A. Gladstone, issued March 22, 1973, WUI was granted leave to intervene in the above-referenced proceeding.

"(1) Whether it is necessary or desirable in the public interest to require RCAGC to interconnect its telegraph message and telex facilities with facilities of ITTWC for the provision of service to and from Guam.

"(a) The effect, financial and other, on ITTWC and RCAGC telex and message services, and the public, were no interconnection to be established; and

"(b) The manner in which ITTWC customers are able to send or receive messages to and from Guam in the absence of interconnection.

"(2) The points at which interconnection, if any, should be established, and the financial and other effects on the ITTWC and RCAGC telex and message services and the public.

"(a) The through routes and charges to be established; and

"(b) The facilities and regulations appropriate to the operation of such routes.

"(c) The charges and the classifications, regulations, and practices affecting such charges; and

"(d) The appropriate division of such charges."

DISCUSSION

3. WUI, in its motion to amend the issues, seeks to be included in each matter at issue in the Commission's February 20, 1973 order wherein mention is made of ITTWC. WUI represents that it is in a position identical to that of ITTWC with respect to the provision of services on Guam; that is, it is authorized to provide leased telegraph channel service and leased voice/data service; it is a joint owner of the satellite earth station on Guam; it holds both indefeasible right-of-user and lease interests in submarine cable circuits radiating from Guam; and it has not been authorized to provide telex and public message telegraph services between the United States and Guam. According to WUI, therefore, it has in common with ITTWC an interest in removing its competitive disadvantage vis-a-vis RCAGC by permitting telex and public message users served by both WUI and ITTWC to communicate directly with Guam through the interconnected facilities of RCAGC. WUI points out that, as ITTWC has done, it has requested interconnection with the facilities of RCAGC and has been refused. From the foregoing it appears that the issues set for hearing by the Commission in its February 20, 1973 order are applicable to WUI and that it would be in the public interest to hear and determine the claims of both ITTWC and WUI concurrently.

4. RCAGC, in its motion, requests the Commission to clarify and enlarge the issues set forth in the Commission's February 20, 1973 order to specifically include consideration of the rights of RCAGC and ITTWC under the formula prescribed by the Commission pursuant to Section 222 of the Communications Act of 1934 [2] with respect to unrouted Guam-bound message telegraph traffic originating in the Western Union Telegraph Company (WU) domestic network. To this end, RCAGC requests a modification of the Commission's second issue as follows:

"(2) The point at which interconnection, if any, should be established and the financial and other effects, *including the redistribution of traffic, if any, pur-*

[2] The International Formula, required by Section 222(e)(1) of the Communications Act of 1934 as an incident to the merger of Western Union Telegraph Company (WU) and Postal Telegraph Company, was prescribed by Commission Order, 10 FCC 184 (1943). It sets out a quota system for the distribution to the international carriers of unrouted outbound messages which, added to messages specifically routed via such carrier, gives it such amount of gross international tolls to a geographical subarea as is proportionate to its share of total industry tolls to such areas in 1942.

suant to the International Formula, on the ITTWC and RCAGC telex and message services and the public . . ."

RCAGC also seeks to add the following issues:

"(3) The rights of RCAGC and ITTWC to the outbound unrouted message telegram traffic to Guam under the International Formula; and

"(4) Whether the public interest requires the amendment of the International Formula if an interconnection is ordered with ITT at a point outside of the United States."

5. RCAGC alleges that, though it has been the sole carrier maintaining telex and message telegraph operations on Guam, it has been suffering losses in the provision of these services—losses that would be aggravated if it were ordered to interconnect with ITTWC (and WUI) at the theoretical midpoint, on a full correspondent basis. According to RCAGC, a factor contributing to this potential increase in losses is the possibility that upon interconnection there would be a redistribution among the carriers of unrouted Guam-bound message telegraph traffic pursuant to the International Formula.

6. RCAGC represents that it received no quota under the Formula with respect to Guam-bound traffic since it did not operate facilities to that subarea until 1952,[3] and that the only companies operating on Guam during the base period were Commercial Pacific Cable Company, now defunct, and Globe Wireless, now absorbed into ITTWC.[4] According to RCAGC, it could theoretically be argued that ITTWC has succeeded to the quota of Globe Wireless even though in the 32 years since the base period it has never applied for it. If this argument were successfully made by ITTWC and if interconnection were ordered at a point outside of the United States Mainland, RCAGC expects that ITTWC would receive the total unrouted message telegraph traffic presently handled by RCAGC.

7. In its opposition to RCAGC's motion for enlargement ITTWC asserts that distribution of message traffic pursuant to the Formula should have no effect on the amount of revenue derived by RCAGC from its operations on Guam. According to ITTWC, RCAGC has been and will continue to be, even if interconnection is ordered, the only carrier on Guam available to provide service and derive tolls from messages incoming from the United States. ITTWC argues that the Formula dictates only WU's choice of international carrier that is to transmit a given message from the U.S. Mainland to an overseas point, thus affecting a carrier's outbound operations but not its operations at overseas points. Finally, ITTWC argues that consideration of a revision of the Formula in this proceeding would be inappropriate in light of the pending inquiry, *In the Matter of International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions of the Formula prescribed under Section 222 of the Communications Act* (Docket 19660).

[3] All unrouted Guam-bound message telegraph traffic has nevertheless been distributed to RCAGC because it alone has been authorized to serve Guam.

[4] Globe Wireless was acquired in 1960 by AC&R, a subsidiary of International Telephone and Telegraph Corporation.

CONCLUSIONS

8. It appears from the pleadings of ITTWC and WUI that their interest in obtaining interconnection is directed solely at gaining direct access to Guam for their respective exclusive telex subscribers and control over telegraph messages specifically routed via their respective facilities (which now must be turned over to RCAGC at the gateway). There is nothing in the pleadings to indicate that either ITTWC or WUI believes it has or intends to claim rights to unrouted Guam-bound message traffic pursuant to the International Formula, or that either desires an amendment to the Formula should interconnection be ordered at a point outside of the United States Mainland.

Accordingly, we see no reason to include in the instant proceeding any issue addressing the necessity or desirability of effecting a change in the current distribution of Guam-bound message telegraph traffic pursuant to the International Formula as an incident to interconnection.

9. It is conceivable that, if the proposed interconnection is ordered, ITTWC and/or WUI will subsequently raise the issue of whether there should be a redistribution of unrouted Guam-bound message telegraph traffic pursuant to the International Formula. If either informs the Commission within fifteen days of the release of this order of an intention to do so, we will take appropriate steps to consider the distribution issue in conjunction with our pending inquiry, *In the Matter of International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions to the Formula prescribed under Section 222 of the Communications Act* (Docket 19660).

10. Accordingly, IT IS ORDERED, that:

(A) The motion to change the issues, filed by WUI on March 12, 1973, IS GRANTED;

(B) the motion for clarification and enlargement of the issues filed by RCAGC on March 19, 1973, IS DENIED.

(C) If either ITTWC or WUI informs the Commission within fifteen days of the release of this order that it intends to seek a redistribution of unrouted Guam-bound message telegraph traffic originating in the WU domestic network, pursuant to the International Formula, as an incident to interconnection with RCAGC's telex and message telegraph operations on Guam, the Commission will take appropriate steps to consider the issue in conjunction with its pending inquiry, *In the Matter of International Record Carriers' Scope of Operations in the Continental United States, Including Possible Revisions to the Formula prescribed under Section 222 of the Communications Act* (Docket 19660).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-535

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re
NOTICE OF APPARENT LIABILITY FOR FORFEITURE TO KSLY BROADCASTING CO., SAN LUIS OBISPO, CALIF.

CERTIFIED MAIL—RETURN RECEIPT REQUESTED

MAY 16, 1973.

KSLY BROADCASTING CO.,
Licensee of Radio Station KSLY,
Post Office Box 1400
San Luis Obispo, Calif. 93401.

GENTLEMEN: This letter constitutes a Notice of Apparent Liability for forfeiture pursuant to Section 503(b)(2) of the Communications Act of 1934, as amended.

In a letter to the Commission of December 1, 1972, Dr. George L. Harper alleged that during the October 27, 1972 "What's On Your Mind" program on KSLY, Homer Odom, the 100% stockholder in the licensee, broadcast a personal attack on his "honesty, character, integrity or like personal qualities" while discussing a controversial issue of public importance. The discussion centered around an election issue (the airport). A recording submitted by Dr. Harper evidences that Mr. Odom said:

"He [referring to Dr. Harper] is either inefficient, in that he doesn't know how to get correct information, or he is willing to pander with falsehoods, in either case he is not a worthy candidate for public office."

Dr. Harper stated that KSLY failed to comply with Section 73.123(a) of the Commission's Rules inasmuch as he was not notified of the attack and did not receive a script or tape of the attack or an offer of a reasonable opportunity to respond to the attack by the licensee. Dr. Harper further stated that this attack on his "honesty, character and integrity" was both personally and professional damaging.

In responding to a Commission inquiry on March 12, 1973 Mr. Odom stated that the issues presented on the October 27, 1972 "What's On Your Mind" program were controversial issues of public importance at the time of the broadcast, but that he had solicited contrasting viewpoints on the issues presented, including the views held by Dr. Harper. Mr. Odom further stated that certain statements were made concerning Dr. Harper's campaign, but that he "did not believe that such [statements] constituted a personal attack on Dr. Harper", and that these statements were mere criticism of a circular Dr. Harper had distributed to the public. Mr. Odom concluded by declaring that on October 31, 1972, Dr. Harper appeared as a guest on "What's On Your Mind", and that although KSLY did not comply with the literal requirements

of Section 73.123(a), Dr. Harper knew the attacks had been made and was afforded this opportunity to respond, but "he chose not to avail himself of the clear and free opportunity to respond."

Dr. Harper replied on March 16, 1973 stating that his appearance on the October 31, 1972 "What's On Your Mind" show was not for the purpose of responding to the personal attack but rather for answering telephone questions along with his two opponents in the Supervisor race, and that even though Mr. Odom controlled the subject range of the telephone questions, the attack was neither mentioned nor was a specific opportunity to respond thereto provided.

It appears that the statement broadcast by you charging that Dr. Harper "panders with falsehoods" was more than a mere unfavorable reference, but was an allegation that Dr. Harper engaged in the deliberate exploitation of lies. This statement appears to attack the "honesty, character, integrity or like personal qualities" of Dr. Harper within the meaning of Section 73.123(a) of the Commission's rules. We have considered your explanation as to the reasons for your failure to observe the rule in question and the circumstances which you assert mitigate the noted violation. However, Dr. Harper's appearance on the October 31, 1972 "What's On Your Mind" program apparently related primarily to KSLY's Section 315 obligations and this appearance in itself would not fulfill the licensee's obligations under Section 73.123 (a). Also, Dr. Harper was not under any obligation to request an opportunity to respond to the attack. The Commission has stated that, "it has always been the duty of a licensee to forward to a person or group attacked notification of the attack and an offer of an opportunity to respond, rather than to await a request or complaint from the person attacked. The notification requirement is of utmost importance . . ." *Personal Attacks; Political Editorials*, 8 F.C.C. 2d 721, at 725. It would appear, therefore, that you willfully or repeatedly violated Section 73.123(a) of the Commission's Rules by failing within one week after the attack to notify Dr. Harper of the attack, furnish him with a script, tape or summary of the attack, and offer him a reasonable opportunity to respond.

It further appears that Mr. Odom's statement that Dr. Harper "is not a worthy candidate for public office" was in opposition to his candidacy, and that since such statement was made by Mr. Odom, licensee's 100% stockholder, the statement constituted an editorial within the meaning of Section 73.123(c). *Colby Broadcasting Co.*, 32 F.C.C. 2d 285 (1971). It further appears that KSLY did not inform Dr. Harper of such editorial opposing his candidacy and did not offer him a reasonable opportunity to respond as required by Section 73.123 (c). It would therefore appear, on the basis of the information before the Commission, that KSLY also violated Section 73.123(c) of the Commission's Rules pertaining to political editorials.

For failing to comply with the obligations attending the broadcast of a personal attack and the political editorial in question, you are subject to forfeiture pursuant to Section 503(b)(1)(B) of the Communications Act, as amended. In view of the serious nature of these violations, the Commission has determined that you have incurred an apparent liability in the amount of one thousand dollars ($1,000) for

willful or repeated failure to observe the requirements of Section 73.123 (a) and (c) of the Commission's Rules.

You are hereby notified that you have the opportunity to file with the Commission within (30) days of the date of the receipt of this Notice, a statement in writing as to why you should not be held liable, or, if liable, why the amount of liability should be reduced or remitted. Any such statement should be filed in duplicate and should contain complete details concerning the allegations heretofore made by the Commission, any justification for the violations involved, and other information which you may desire to bring to the attention of the Commission. Statements of circumstances should be supported by copies of relevant documents where available. Upon receipt of any such reply, the Commission will determine whether the facts set forth therein are sufficient to relieve you of liability. If it is unable to find that you should be relieved of liability, the Commission will issue an Order of Forfeiture and the forfeiture will be payable to the Treasurer of the United States.

If you do not file, within thirty (30) days of the date of the receipt of this Notice, either a statement of non-liability or a statement setting forth facts and reasons why the forfeiture should be of a lesser amount, the Commission will enter an Order of Forfeiture in the amount of one thousand dollars ($1,000).

If you do not wish to file a statement which denies liability, and, in addition, you do not wish to await the issuance of an Order, you may, within thirty (30) days of the date of the receipt of this letter, make payment of the forfeiture by mailing to the Commission a check, or similar instrument in the amount of the one thousand dollars ($1,000), drawn payable to the Treasurer of the United States.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73R-202

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of MEDIA, INC., YOUNGSTOWN, OHIO	Docket No. 18768 File No. BP-17435
JUD, INC., ELLWOOD CITY, PA. For Construction Permits	Docket No. 18769 File No. BP-17749

APPEARANCES

Robert W. Healy, on behalf of Media, Inc.; *Lewis I. Cohen* and *Edward R. Wholl*, on behalf of Jud, Incorporated; *Frank U. Fletcher* and *Marvin Rosenberg*, on behalf of Hubbard Broadcasting, Inc.; and *Jay L. Witkin* and *David G. Richards*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted May 22, 1973; Released June 1, 1973)

BY THE REVIEW BOARD: NELSON, PINCOCK, AND KESSLER.

1. Media, Inc. (Media), and Jud, Incorporated (Jud), are mutually exclusive applicants for new standard broadcast stations to be operated on the frequency 1500 kHz. Media proposes to operate with a power of 500 watts, daytime only, employing 250 watts power during critical hours, with different directional antenna patterns, at Youngstown, Ohio. Jud proposes to operate with 250 watts power, daytime only, with a directional antenna, at Ellwood City, Ohio. In an Initial Decision (FCC 72D-6), released January 28, 1972, the late Administrative Law Judge Charles J. Frederick recommended that the application of Jud be granted and that the Media application be denied. Resolving the Section 307(b) issue in favor of Jud on the basis of his erroneous reasoning that "the disposition of this proceeding must turn upon the preference which may be made under Section 307(b) of the Communications Act", the Presiding Judge, in effect, held that despite the fact that he disqualified Jud under the Sections 1.65 and 1.514(a) issues in this proceeding, a grant should be made to Jud under Section 307(b) of the Communications Act, "because it would bring the first truly competitive aural outlet to Ellwood City."[1]

[1] As indicated in paras. 3-6, *infra*, we do not reach the Section 307(b) issue here; however, in passing it is noted that the quoted portion of the Judge's rationale misstates the Commission's Section 307(b) allocation objectives. While competition is undoubtedly an ancillary benefit of these objectives, the prime Section 307(b) questions are whether a grant of Jud's application would accord Ellwood City with a choice of locally originating aural programs, and whether Jud should, therefore, be preferred to Media which would provide another facility to Youngstown, a community which already has multiple local aural originating stations. *Northwestern Ohio Broadcasting Co.*, 13 FCC 231, 3 RR 1945 (1948), *aff'd sub nom., Sky Way Broadcasting Corp.* v. *FCC*, 85 U.S. App. D.C. 425, 176 F.2d 951 (1949). (Per curiam.)

2. The proceeding is now before the Review Board on exceptions to the Initial Decision filed by each of the applicants and by the Broadcast Bureau. We have reviewed the Initial Decision in light of these exceptions, our examination of the record, and the oral argument presented before a panel of the Review Board on February 6, 1973. Our rulings on the exceptions of the parties are set forth in the Appendix annexed hereto. Briefly stated, we affirm the basic findings and ultimate findings and conclusions of the Initial Decision establishing that Media has met its burden of proof under its technical and qualifications issues. In this regard, we note that these findings and conclusions are uncontested by the parties.

3. At the outset, we emphasize that, in light of the exceptions of the parties, we are in major disagreement with the late Judge's ultimate findings and conclusions relating to Jud's application which involves *three* basic technical and qualifying issues, namely, (a) a Section 73.188(b)(1) issue; (b) a *Suburban* issue; and (c) Sections 1.65 and 1.514(a) issues. First, as indicated above, the rationale of the Initial Decision which disqualified Jud on the Section 1.514(a) and 1.65 issues, but, nevertheless, grants the application under Section 307(b), cannot stand. For it has been long established Commission law, based upon statutory construction of the Communications Act, that an applicant is not entitled to consideration under Section 307(b) of the Act unless and until all outstanding and prerequisite qualifying issues against it have been favorably resolved where, in accordance with Sections 308 and 309(a) of the Communications Act, the Commission can find that the applicant has established its financial, technical and other qualifications to operate the station. *Saul M. Miller*, 1 FCC 2d 1388, 6 RR 2d 525 (1965); *Du Page County Broadcasting, Inc.*, 19 FCC 2d 250, 17 RR 2d 229 (1969). We, accordingly, do not adopt the ultimate conclusion of the Initial Decision granting the Jud application.

4. Secondly, although we adopt the basic and ultimate findings of the Initial Decision which favorably resolve Jud's Section 73.188(b)(1) issue, we affirm only the basic findings with respect to Jud's Sections 1.514(a) and 1.65 issues. In short, we agree with the Broadcast Bureau's position that Jud's admitted violations of Sections 1.514(a) and 1.65 do not warrant disqualification and a denial of its application. There is no record evidence of any intention by any of Jud's principals to withhold information, and the facts, particularly those relating to the evolution of the Commission's CATV reporting requirements, establish that the omissions have been unintentional. We, accordingly, do not adopt the adverse ultimate findings or conclusion of the Initial Decision on these issues.

5. However, of major importance is our disagreement with the late Judge, as well as the Broadcast Bureau, on their technique of concluding summarily, without prerequisite findings of fact, that Jud has met its burden of proof on the *Suburban* issue. In this connection, we note that Jud's presentation on this record is not uncontested as shown by Media's Proposed Findings and Conclusions, as well as by its exceptions to the Initial Decision. We also note the Broadcast Bureau's active participation in the hearing of this proceeding with respect to the *Suburban* issue, as well as the other qualifying issues, and the pro-

testations of Bureau counsel on this record concerning his difficulties in analyzing what the Judge has described as the "prodigious"[2] amount of data supplied by Jud. (Tr. 739; see, also, paras. 74–76 of the Initial Decision.) Nevertheless, the Bureau submitted no proposed findings with respect to this issue, and instead summarily concluded that Jud had met this issue. Finally, we note the Bureau's apparent acquiescence in the Judge's technique of incorporating by reference the entire record showing into the Initial Decision,[3] in lieu of the prerequisite basic and ultimate findings of fact. However, in light of Media's exceptions, we cannot accept this approach of the Bureau or of the Judge because it is contrary to fundamental principles relating to essential elements of a valid decision prescribed (a) by 5 USC § 557(c) (formerly Section 8 of the Administrative Procedure Act); (b) by Section 1.267(b) of the Commission's Rules; (c) by a series of judicial decisions commencing with the landmark case of *Saginaw Broadcasting Co.* v. *FCC*.[4] The Board has, accordingly, perforce undertaken its own analysis of the record, of Jud's Proposed Findings relating to the *Suburban* issue, and of Media's position contesting a favorable resolution of this issue. In view of the Judge's failure to make pertinent findings, there follows a detailed analysis of the record, and on the basis of our detailed findings and conclusions on the *Suburban* issue set forth below, the Board has reached the ultimate conclusion that Jud's application must be denied because a grant would be contrary to the public interest in light of Jud's failure to meet its burden of proof on the *Suburban* issue.

6. Since we have determined that independently of any consideration of the existence of Media's application, the application of Jud must be denied, it will not therefore be necessary to reach the Section 307(b) issue, and the findings and conclusions of the Initial Decision with respect to this issue are not adopted. See cases cited in para. 3, *supra*. *Cf. Simmons* v. *FCC*, 83 U.S. App. D.C. 262, 169 F.2d 670 (1948) *cert. denied*, 335 U.S. 846. Hence, the *Suburban* issue is the only viable issue requiring extended discussion. In detailing our findings and conclusion which follow, the Board has taken great care to make a comprehensive analysis of the record beyond that actually required; we do so in order to assist other reviewing authorities in examining our judgment with the closest of scrutiny *vis-a-vis* the Bureau's and the Judge's unsupported conclusions to the contrary.

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[2] According to Webster's New International Dictionary, Second Edition, this word is defined, as follows:

Prodigious—adj. 1: of the nature of a prodigy or omen; portentous; 2: out of the course of nature; . . . monstrous; 3: extraordinary in bulk, extent, quantity, or degree; vast; huge; immense. Syn.—enormous, tremendous, amazing, astonishing, ...

As shown by paras. 22–26, *infra*, relating to Jud's showing, we agree with the Judge's characterization of this record.

[3] No exceptions were filed by the Bureau relating to this technique, although Media does challenge this methodology by specific exceptions.

[4] 68 App. D.C. 282, 96 F.2d 554 (1938); see also *Tri-State Broadcasting Co.* v. *FCC*, 68 App. D.C. 292, 294, 96 F.2d 564, 566 (1938); *Telanserphone Inc.* v. *FCC*, 97 U.S. App. D.C. 398, 401, 231 F.2d 732, 735 (1956); *Greater Boston Television Corporation* v. *FCC*, 143 U.S. App. D.C. 383, 444 F.2d 841 (1970).

BACKGROUND

7. Initially, it is to be noted that (a) the Commission's designation Order herein (FCC 69–1372, 20 FCC 2d 937), specifying the *Suburban* issue [5] against Jud, Incorporated, was released on December 17, 1969; (b) six months prior thereto, on June 11, 1969, the Commission had released its decision in *City of Camden*, 18 FCC 2d 412, 16 RR 2d 555; and (c) two days after the designation Order herein, on December 19, 1969, the Commission released its proposed *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 20 FCC 2d 880. Subsequently, on March 26, 1970, the Commission released its *Interim Procedures* relating to submission of community survey showings, 22 FCC 2d 421, 18 RR 2d 1923. In accordance with the *Interim Procedures*, the Judge, at a hearing session held in the instant proceeding on April 28, 1970, offered to postpone the *Suburban* issue phase of this hearing until such time as the Commission issued its final *Primer*.[6] However, at pages 73–75 and 143 of the transcript, Jud's counsel stated that the applicant would assume the risks of proceeding to hearing on the *Suburban* issue at that time. Hence, at the hearing sessions on April 29, 1970 (Volume 3 of the transcript), and on May 14, 1970 (Volume 4 of the transcript), evidence was presented relating to the composition of Ellwood City and the area proposed to be served; it was not until the hearing session on June 15, 1971 (Volume 5 of the transcript)—and several months after the issuance of the final *Primer* (note 6, *supra*)—that Jud presented its Exhs. 12 and 13 as its evidentiary showing with respect to its community ascertainment and its proposed programming.

8. Before turning to Jud's evidentiary showing in this record, mention should also be made of (a) the composition of Jud; (b) pertinent facts relating to Jud's original application, *per se*, and its pre-designation programming proposals; (c) its post-designation amendments; and (d) background facts relating to Jud's Exhs. 2,[7] 12, and 13 which comprise its written testimony with respect to the *Suburban* issue.

9. *Composition of Jud:* These facts are detailed at paras. 25–27 of the findings of the Initial Decision, and therefore will be only briefly described here. Jud, Incorporated, is a family-owned company, with Jud Sedwick, its president and 99.6% stockholder, at its helm. Ned Sedwick and Ott Sedwick are vice president and treasurer, respectively, and each owns a 0.2% stock interest in the company. Jud, Ned, and Ott Sedwick are brothers, and reside at Kittanning, Pennsylvania, which is approximately 40 miles from Ellwood City. Jay Sedwick is secretary of the company; he owns no stock interest. He is the son of Jud Sedwick, and resides at Butler, Pennsylvania. Jud, Incorporated,

[5] As shown by the Commission's designation Order, the Commission specified the *Suburban* issue because it could not determine on the basis of Jud's pre-designation information whether "those interviewed constitute a representative range of groups or organizations within the area to be served"; whether those interviewed by the applicant "listed community needs"; and whether "interviews were conducted in the communities outside Ellwood City which Jud proposes to serve".

[6] The final *Primer* was released on February 23, 1971, 27 FCC 2d 650, 21 RR 2d 1507.

[7] Although Jud Exh. 2 was presented in the context of the Section 307(b) issue, its preparation by Ott Sedwick, treasurer of the company and a 0.2% stockholder, is relied upon by him to establish his knowledge of the *"composition of the population of the Ellwood City area"* in connection with his post-designation community ascertainment survey and the applicant's modified proposed program plans. (Emphasis supplied.) See Jud Exh. 12, p. 2, lines 12–14.

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owns (a) a 50% interest in National Cable Television, a company which owns and operates CATV systems; and (b) five independent telephone companies located in various communities. This same family group, with Jud Sedwick, as its 98% stockholder, also owns Armstrong Utilities, which is similarly engaged in the ownership and operation of various CATV systems. See paras. 26–30 of the findings of the Initial Decision, which describe the location of the CATV systems and/or franchises of National Cable Television and Armstrong Utilities. These CATV companies either operate CATV systems or hold CATV franchises in the following, among other, communities: Ellwood City, Wayne Township, Ellport Borough, Perry Township, Wampum Borough, North Sewickley Township, Franklin Township, Big Beaver, New Beaver, and Koppel. All of these communities are situated within the Greater Ellwood City Area. See para. 21, *infra*.

10. *The original application and pre-designation amendment:* Jud's subject application was filed on May 10, 1967. It was prepared under the direction of Jay Sedwick, secretary, who signed the application. In response to questions 13 and 14 of section IV of the application, Jud proposes to operate the station 84 hours per week, devoting 14 hours or 16.6% of the station's time to news programs; 4 hours or 4.8% of time to public affairs programs; and 7 hours or 8.3% of time to all other programs, exclusive of entertainment and sports. (Tr. 722.) By Exh. 5 of the application, it is stated that "the major communities which the applicant proposes to serve are: Ellwood City, Wampum Borough, Wayne Township, Franklin Township, and Ellport Borough." (Tr. 748–49.) In response to Question 27, Part IV of the application, it is also stated that the applicant "proposes to employ a full time station manager who will determine the day-to-day operational policies of the station" and that the station manager "will report directly to Ott Sedwick, the treasurer of the applicant, who will be the general manager of the station." It is also stated that "Mr. [Ott] Sedwick, who resides in the area,[8] will devote approximately one day each week to his duties as general manager of the station." (Tr. 755.)

11. Prior to the issuance of the Commission's designation Order, several amendments to the application were filed by Jud, including an amendment dated November 2, 1968, relating to a community ascertainment survey and the applicant's proposed programs. This amendment, signed by Jay Sedwick, secretary, is devoid, on its face, of information indicating any background facts concerning the participation of any of Jud's principals in the survey or in the planning of the proposed programming, other than the abstract fact that Jay Sedwick, as secretary, signed that amendment. And, at the hearing in this proceeding, Ott Sedwick, treasurer of the company, testified that no reliance whatsoever is placed by the applicant on its pre-

[8] Ott Sedwick, as pointed out above, resides in Kittanning, Pennsylvania, approximately 40 miles from Ellwood City. As shown by para. 21, *infra*, Kittanning is not a part of the Greater Ellwood City Area.

designation survey or program proposal.[9] Ott Sedwick also testified that he was not involved in the pre-designation surveys or programming planning. However, it is Ott Sedwick who signed and submitted the applicant's post-designation community ascertainment survey and proposed programming amendment, dated March 10, 1970, as well as a subsequent amendment, dated May 28, 1971, updating to a limited extent the prior March 1970 survey amendment and program proposal. It is also Ott Sedwick who prepared Jud Exh. 2, dated March 5, 1970, relating to the demographic composition of Ellwood City, which, as will be shown below, is essentially devoid of basic information relating to the characteristics of its population. *Cf.* note 7, *supra*. It is also Ott Sedwick who appeared at the hearing as Jud's sole witness with respect to its Exh. 2 and its Exhs. 12 and 13, the latter of which are essentially duplicates of Jud's March 1970 and May 1971 amendments relating to its surveys and program proposals. However, at this juncture it is to be noted that although Ott Sedwick prepared and attempted to sponsor Jud Exh. 2 (the demographic information), his inability to answer questions concerning that exhibit caused its counsel to substitute in his stead Mr. Stephen Rubino, president of the Ellwood City Borough Council. Jud Exh. 2 was allowed into the record of the proceeding (a) to the extent that Mr. Rubino adopted the information therein prepared by Ott Sedwick, and (b) to the extent that the data were relevant, material, and competent. Large portions of Exh. 2 were not admitted into the record.

12. In sum, the chronology of background information set forth above makes clear that Jud assumed the risks of proceeding to hearing on the *Suburban* issue (para. 7, *supra*), and that Ott Sedwick:

(a) in preparing Jud Exh. 2 (the demographic information), dated March 5, 1970, had the benefit of the Commission's proposed *Primer;*

(b) in making the applicant's post-designation surveys in February 1970 and its amended program proposal which are set forth in the March 1970 amendment and in Exh. 12, he also had the benefit of the proposed *Primer;*

(c) in making the applicant's updated albeit limited additional survey in May 1971 (Jud Exh. 13) and in modifying the prior March 1970 program proposal, he, likewise, not only had the benefit of the proposed *Primer*, but, in addition, he had the benefit of the final *Primer;* and

[9] It is, nevertheless, of significance that the pre-designation amendment, signed by Jay Sedwick, secretary, in pertinent part, reads, as follows:

In response to the interest shown in the survey, and in accord with applicant's evaluation and judgment thereof, a one-half hour program devoted to the local affairs of Ellwood City will be carried each week. Applicant will also explore the possibility of having an "open mike" type show where residents of the community can call and express their views and exchange ideas. The station will attempt to serve as the community's "bulletin board" by broadcasting public service announcements for area organizations and other news of local events. *An hour religious service will be carried each Sunday morning.* For the same reasons, and based upon the same evaluation, a five-minute daily devotional, perhaps conducted by a local minister, will be carried every morning, Monday through Saturday, as well as other religious programs. *As for the interest in programs for the aged and senior citizens, applicant will present a one-half hour show each week featuring a prominent local senior citizen and presenting information such as social security developments and special recreational programs available to senior citizens. Educational programs will be broadcast from time to time.*" (Emphasis supplied.) See Jud's pre-designation amendment, dated November 1968, signed by Jay Sedwick, secretary, which has now been *abandoned* completely by the applicant.

(d) in testifying in the proceeding on June 15, 1971, he also had the benefit of all of the information and Commission guidelines set forth in (c) above, including the final *Primer*.

Nevertheless, and despite Ott Sedwick's admitted knowledge, at least of the physical existence of the proposed and final *Primer*, the totality of the evidence in this proceeding on the *Suburban* issue is, at best, ambiguous and vague, and demonstrates that he essentially ignored these guidelines, as well as the basic principles and objectives of the *Primer*. Indeed, when asked during the hearing whether he reviewed the proposed *Primer*, he merely stated that he "saw" the document. (Tr. 662.) Moreover, it is our view that the mere fact that these principles, objectives and guidelines are not rules, *per se*, cannot be construed as an invitation effectively to ignore them. While an applicant, particularly for a daytime only radio station in a small community, should be permitted some latitude in making its showing, as stated in the proposed *Primer*, the applicant's methodology must rest upon "good faith efforts and *sound principles*." (Emphasis supplied.) Or stated another way, it must be based upon a methodology which, at the least, conforms with the basic principles and objectives of the *Primer*. Guess-work and haphazard procedures are inadequate. See Q. & A. 9 of the proposed *Primer*. And these basic concepts are equally prescribed by the final *Primer*. Finally, it is in these basic respects that Jud has failed. This brings us to our findings of fact with respect to Jud's inadequate showing.

The local identity and recognition of the "Greater Ellwood City Area" and the communities which comprise it; the composition of Ellwood City; the existing communications media; the characteristics of the population of Ellwood City; the communities within Jud's proposed service area and the major communities which it proposes to serve.

13. Jud Exh. 2 contains a description of the geographic composition of Ellwood City; its highways and rail and air transportation facilities; its banks; a list of its industries; its retail and wholesale trade; its local government; a list of its civic, service, and fraternal organizations; a list of its churches; its schools; its housing, hospital, and communications facilities. Attached to Jud Exh. 2 is an addendum entitled "Sources" of the information set forth in the text of the exhibit. Analysis of the exhibit, as well as all of the testimony relating to it, establishes that it is an industrial city; however, other than general white and black population data and income data, this record is devoid of evidence relating to the *characteristics of the population of Ellwood City* and the area to be served. Thus, Ott Sedwick cannot be credited with knowledge of such population characteristics, despite his assertion (note 7, *supra*) that he obtained such knowledge in the preparation of Jud Exh. 2. Nor does Jud provide a record citation in para. 33 of its reply findings to support its position that Sedwick obtained such information from reliable sources. At best, the record indicates that he made inquiry concerning the black population. However, the term "population characteristics" does not automatically mean blacks; it also includes ethnic groups, etc. See para. 20, *infra*.

14. *Location:* Ellwood City, with a 1970 Census population of 10,857 residents (a 12.5% decrease from the 1960 U.S. Census popu-

lation figure of 12,413), is situated in both Beaver and Lawrence Counties, predominantly in the latter, and lies in the western sector of Pennsylvania, ten miles from the Ohio state line. It is located 25 miles from Youngstown, 90 miles south of Erie, 37 miles north of Pittsburgh, and 14 miles south of the county seat of Lawrence County, namely, New Castle.

15. *Area Identity:* The "Greater Ellwood City Area" has a recognized local identity,[10] which includes Ellwood City and 10 contiguous or nearby communities. However, Ellwood City has no jurisdiction over any governmental operation of the nearby boroughs and townships. They have their own separate governments, fire and police departments and a separate taxing base. (See, Rubino testimony, May 14, 1970, Tr. 116, 186, 189, 227.) Ellwood City functions as the trading center for the "Greater Ellwood City Area", making available to its neighboring communities the wares of some 48 stores of all varieties (Tr. 103, 176), while, in contrast, the neighboring communities have few stores available to their respective inhabitants. Ellwood City is also the location for the area's only hospital and library. Ott Sedwick in defining the "Greater Ellwood City Area" limited it to include only seven communities, namely, Ellwood City, Ellport Borough, Perry Township, Franklin Township, Wayne Township, North Sewickley Township, and Wampum Borough.[11] (Tr. 68.) However, Jud's 307(b) exhibit (Exh. 2) was ultimately adopted in part, and sponsored by Stephen B. Rubino, a lifetime resident of Ellwood City and president of the Borough Council of Ellwood City, who defined the "Greater Ellwood City Area" to include four additional communities, namely New Beaver Borough, Big Beaver Borough, Koppel Borough, and Little Beaver Township. (Tr. 174.) Rubino also listed the community of Frisco, an unincorporated entity within Franklin Township, listed in the 1960 U.S. Census, but unlisted in the most recent population count. Based upon Rubino's established long-time familiarity with the area and the position which he holds as President of the Borough Council, we accord substantial weight to his testimony, and accordingly find that as locally known and recognized, the "Greater Ellwood City Area" is composed of the following 11 communities: the boroughs of Ellwood City, Ellport, Wampum, New Beaver, Big Beaver and Koppel and the townships of Perry, Franklin, Wayne, North Sewickley and Little Beaver. Five of these nearby communities are contiguous to Ellwood City, and the remaining five are situated at distances ranging from one to four miles. See, para. 21, *infra.*

16. Organizations in which some, if not all, of these communities participate and which therefore corroborate the local recognition of the geographical identity of the "Greater Ellwood City Area" include the Ellwood City Area School District, the Ellwood City Area Amateur Baseball League, the Ellwood City Community Band, the Police Communications Project, the Fire Protection Mutual Assistance Pact, and several others. The identity of this population grouping as it is known locally, is also corroborated by the fact, as will be shown in para. 21, *infra*, that companies under common ownership with Jud

[10] *Cf. Seven Locks Broadcasting Company*, 37 FCC 82, 3 RR 2d 177 (1964).
[11] See, para. 21, *infra.*

either operate CATV systems or hold CATV franchises in nine of these contiguous or nearby communities, with the Ellwood City CATV head-end serving each of them. Hence, this record establishes the locally recognized identity of the Greater Ellwood City Area; however, it is devoid of evidence establishing the homogeneity of this area, *i.e.*, the respective population characteristics and, as indicated above, each community has its own separate government.

17. *Composition of Ellwood City:* The elected government of Ellwood City consists of a mayor and ten councilmen, two from each of the five wards, A Borough Manager is employed to effectuate the decisions of those elected and to supervise operation of the governmental services provided to the citizens of Ellwood City. The municipal government has 65 full time employees and an operating budget of $1,300,000. Ellwood City also has a planning commission consisting of five members appointed by the borough council from the local businesses and professionals. There is also a zoning board of review made up of three men appointed by the council. Ott Sedwick testified that he did not know definitely what services were provided to Ellwood City by the Lawrence County government, although he "imagine[d]" that services were provided. (Tr. 687.)

18. Public education in the "Greater Ellwood City Area" is administered by the Ellwood City Area School District, a legislatively created "jointure" comprised of Ellwood City Borough, Wampum Borough, Ellport Borough, Wayne Township and Perry Township. The School District raises funds by means of a legislatively authorized one percent wage tax withheld by employers within the School District from the earnings of employees residing in the School District. The Ellwood City Area School District currently operates ten schools, nine elementary and one secondary containing both junior and senior high facilities. The School District enrollment is currently 4,300 pupils. The professional staff in the Ellwood City Area School District numbers approximately 210 plus 61 service personnel. There are currently 105 students from the Ellwood City Area School District who attend the New Lawrence County Vocational-Technical School, located in New Castle and with which the School District is affiliated. The area is also served by 12 colleges and universities within a 40-mile radius of Ellwood City.

19. *Existing Communications Media:* As the late Judge correctly observed at para. 19 of the findings of the Initial Decision, and again at para. 5 of the conclusions, there are no standard nor television broadcast stations licensed in Ellwood City; however, there is an FM broadcast station operating there, WFEM, and at least five AM broadcast stations [12] provide primary service to both the urban and rural portions of Jud's proposed service area. The Ellwood City area CATV systems, para. 21, *infra*, deliver 12 channels to their subscribers, bringing in commercial stations from Pittsburgh, Johnstown, Wheeling,

[12] Stations providing AM primary service (0.5 mv/m or greater) to all of the rural areas proposed to be served are: WKBN, Youngstown, Ohio; WISR, Butler, Pennsylvania; WPIC, Sharon, Pennsylvania; KDKA, Pittsburgh, Pennsylvania; and WKST, New Castle, Pennsylvania. Stations providing primary service (2.0 mv/m or greater) to the urban areas which include the two communities of Ellwood City and New Castle are: WKBN, Youngstown; WPIC, Sharon; KDKA, Pittsburgh; WBZY and WKST, New Castle. The record does not show the availability of FM services, other than the location of WFEM, Ellwood City.

Steubenville and Youngstown. An educational station from Pittsburgh is carried, and there is one time and weather channel. There is no local origination. Ellwood City has one local newspaper, the *Ellwood City Ledger*, which is published six days a week. The *New Castle News* from New Castle,[13] is also distributed in Ellwood City daily, except Sundays. There is also some circulation of the *Pittsburgh Post-Gazette* and, on Sundays only, the *Youngstown Vindicator*.

20. *Population Characteristics:* The characteristics of the population of Ellwood City,[14] based upon the 1970 U.S. Census, have been officially noticed by the Board,[15] and may be briefly described as follows:

Total Population: 10,857.
Educational Level:

Persons 25 years and older—Median number of school years completed: 12. Percent who completed 4 years of high school or more: 49.7. Percent completing less than 5 years of school: 3.1.

Persons 3 to 34 years—Percentage enrolled in schools: 54.2 (24.5% of Ellwood City.)

Economic Characteristics:

Civilian labor force, percent unemployed: 6.5.
Percent in manufacturing industries: 52.9.
Percent in white-collar occupations: 42.1.
Percent government workers: 13.0.

Ethnic Breakdown:

Percent Negro: 0.72.
Percent foreign born: 8.2.
Total foreign born: 882.
Total foreign stock: 3,351.
Major country of origin: Italy (1,786).

Age:

Median age: 36.8.
Percent over 18: 69.3.
Percent over 65: 13.4.
Percent under 18: 30.7.

Income Levels:

Median Income: $8,476.
Less than poverty level: 9.7%.
$15,000 or more: 10%.

County Data:

Ellwood City has 9,754 persons located in Lawrence County and 1,103 persons located in Beaver County. Lawrence County has 4.9% rural farm and 42.3% rural non-farm populations with a median income of $8,664. Beaver County has 2.1% rural farm and 20.7% rural non-farm populations with a median income of $9,428.

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[13] As indicated previously, New Castle is situated 14 miles from Ellwood City, and it is the county seat of Lawrence County where the bulk of Ellwood City's population is situated.

[14] Even the late Judge noted the complete lack of a breakdown of ethnic characteristics for Ellwood City. (Tr. 737.)

[15] The Board is aware of the prescription of 5 U.S.C. § 556(e) that "When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." Any dispute with respect to the use of this official U.S. Census material must be addressed to the Review Board in the form of a petition for reconsideration under Section 1.106(a) of the Commission's Rules. See *WMOZ, Inc.*, 36 FCC 201, 209, 1 RR 2d 801, 816–17 (1964).

21. *Service Area and Major Communities Served:* Turning to the major communities which Jud proposes to serve, and those communities which fall within Jud's proposed service area (with populations greater than 1,000 persons), the following chart lists those communities, their population, their distance from Ellwood City and their location with respect to Jud's proposed contours:

Boroughs	Population (1970)	Approximate distance from Ellwood City (miles)	Approximate signal from proposed station (mv/m)	CATV system [1]
Bessemer	1,427	11	0.5	
Big Beaver	2,739	3	.5	X
Ellport [2]	1,350	Contiguous	25.0	X
Koppe	1,312	1	2.0	X
New Beaver	1,426	1	2.0	X
Wampum [2]	1,189	2	5.0	X
West Middlesex	1,293	22	.5	
Townships:				
Beaver County:				
Franklin [2]	3,488	Contiguous	.5	X
North Sewickley	6,048	Contiguous	2.0	X
Butler County:				
Franklin	1,700	11	.5	
Lancaster	1,430	6	.5	
Muddy Creek	1,148	6	2.0	
Lawrence County:				
Mahoning	3,646	10	.5	
North Beaver	3,475	4	2.0	
Perry	1,841	Contiguous	5.0	X
Shenango	7,798	2	2.0	
Slippery Rock	2,541	2	2.0	
Taylor	1,152	4	2.0	
Wayne [2]	3,130	Contiguous	5.0	X

[1] In addition to the Ellwood City CATV system, companies under common ownership with Jud either operate CATV systems or hold CATV franchises for each of these communities, all of which are situated within the "Greater Ellwood City Area", and the Ellwood City CATV system serves as the head-end for these other CATV systems.

[2] These are the major communities which the applicant proposes to serve, in addition to its principal community of Ellwood City. See para. 10, *supra*. Ott Sedwick testified that he did not consult any maps to determine the existence of communities located within his proposed service area (Tr. 745–46), but confined his efforts to communities "adjacent" to Ellwood City. (Tr. 681.) The chart above indicates that two adjacent communities are not proposed to be served by Jud: Perry Township with a population of 1,841 and North Sewickley Township with a population of 6,048. This chart also establishes that Big Beaver, Koppel, and New Beaver are located within distances ranging from one to four miles from Ellwood City. With respect to the other communities outside of the Greater Ellwood City Area, Ott Sedwick indicated his reason for not surveying New Castle: "New Castle already has an AM station, *as many other communities surrounding the area have AM stations.*" (Emphasis supplied.) (Tr. 687.) None of the communities listed in the chart have either AM or FM stations licensed to them.

NOTE.—None of the above communities has a licensed AM or FM broadcast station.

COMMUNITY ASCERTAINMENT OF PROBLEMS, NEEDS, AND INTERESTS, AND PROPOSED PROGRAMMING

22. To ascertain community needs, problems, and interests, Ott Sedwick, who lives in Kittanning, Pennsylvania, approximately 40 miles from Ellwood City, spent approximately 10 days there in order to make the applicant's March 1970 post-designation survey. The showing of the applicant with respect to these surveys and its proposed programming is set forth in (a) Jud Exhs. 12A and 12B (the March 1970 surveys); Exh. 13 (the supplementary May 1971 survey); and (c) his testimony of record. Exh. 12A is a 10-page double-spaced affidavit of Ott Sedwick relating to the March 1970 surveys. Exh. 12B consists of approximately 200 pages of copies of a questionnaire used by Ott Sedwick with respect to his contact with 47 persons (7 face-to-

face and 40 by telephone)[16] in the Greater Ellwood City Area. These 200 pages of data were placed bodily in the record; it constitutes what the Judge characterized as the applicant's "prodigious" efforts, and we agree with this characterization.[17] It is evident that the 10 pages of double-spaced text set forth in Exh. 12A and the 1½ pages of text set forth in Exh. 13, do not fit such a characterization. Examination of the record shows that the 200 pages of Exh. 12B were placed in the record haphazardly, unalphabetized as to the interviewees, with no analysis.[18] Indeed, it is to be noted that there is no contention in Jud's proposed findings that these 47 persons, on the basis of Ott Sedwick's best information and belief, are community leaders; nor is there any contention in Jud's proposed findings that these 47 persons are representative of all significant groups in the community. Instead, para. 87 of Jud's proposed findings merely indicates that Ott Sedwick "*attempted*" to contact the leaders in education, youth, and leaders among the elderly, businessmen, public officials, civic groups, unions, and minority groups (emphasis supplied). In our view, this proposed finding is incompatible with the fundamental principles and objectives of the *Primer* as more specifically detailed below.

23. Bearing in mind the deficient state of this record relating to the population characteristics of Ellwood City (para. 20, *supra*), it is evident that the applicant did not make a population characteristics study either prior to or subsequent to the selection of the 47 persons interviewed, which comprise Jud's alleged community leaders survey.[19] See Q's & A's 10 and 13(a), and paras. 27–30 of the *Primer*. Nor does the totality of other evidence in this record establish the applicant's awareness, let alone its recognition of Ellwood City's significant population groups, *i.e.*, (a) its ethnic groups; (b) its population with incomes below the poverty level; (c) its population comprising "the aged", etc.

24. More specifically, the potpourri of information set forth in the 200 pages of bulk data does indicate that Ott Sedwick contacted 47 persons, comprising the applicant's alleged community leaders survey; however, this bulk data, with few exceptions, in no way reveals to what extent these 47 person are representative of significant population groupings, even though it does indicate that he contacted three black persons, and a few persons whose names and affiliated organizations reveal that they may be a part of Ellwood City's ethnic groups, or that of its "aged". We, accordingly, cannot deem this 200 pages of bulk data to constitute a substitute for the omission, in the first place,

[16] One person was contacted by someone other than Ott Sedwick.

[17] See, note 2, *supra*.

[18] Since Exhs. 12A and 12B are duplicates of Jud's March 1970 amendment to its application, there are 400 pages of copies comprising the same information, and the lack of orderliness precludes page-by-page examination of the amendment data with the Jud Exh. 12B data. In addition, para. 89 of Jud's proposed findings includes 48 pages of duplication of this same data (at pages 43(a)–44(v)). Obviously, this bulk merely brings clutter to the record. In this connection, it is to be noted Jud's only specific proposed finding with respect to all of this bulk data reads, as follows: "The persons interviewed for the community leaders survey, their address, employment, positions held, and survey responses are as follows:". Thereafter, there follows 48 pages of the interview sheets described above. Because of the lack of orderliness in placing this bulk data in the record, as well as in Jud's proposed findings, it is difficult to compare original interview sheets with the typed versions in the proposed findings. However, a comparison does reveal that those in the proposed findings, are, at best, a summary of the responses in the originals. Moreover, in some instances, there have been deletions in the summaries of community problems revealed in the originals. For example, compare the original interview sheets of Exh. B, pps. 56–59 and pps. 116–119 with the typed versions in the proposed findings.

of the detailed population characteristics showing as required by Q. & A. 10 and para. 30 of the *Primer*. See, also, notes 7 and 14, and para. 20, *supra*. Moreover, Ott Sedwick's own testimony negates, rather than recognizes, even the sheer physical existence of these significant Ellwood City groups. Thus, for example, he testified that although he "particularly sought out minority group leaders and dissatisfied and dissident groups," he "found few such groups or persons whom he considered leaders in such groups," and, illustratively, he referred only to the few black persons in the area, with no mention whatsoever of the existence of these other significant groups. Obviously, his testimony here conveys the impression that all these groups are inconsequential in Ellwood City. Given the stated regulatory objectives of the *Primer*,[20] and the ordinary dictionary definition of the word "minority",[21] Ott Sedwick's testimony in this respect is patently ambiguous, if not evasive. He further testified that there does not seem to be "a *disproportionate* high percentage of retired persons"; however, it is axiomatic, on the basis of the regulatory objectives of the *Primer*,[22] that his use of the word "*disproportionate*" distorts what constitutes a significant and/or a minority group. (Emphasis supplied.)

25. Accordingly, we conclude that Jud's showing, standing alone, falls far short of constituting a *prima facie* showing that there are no significant minority populations in Ellwood City which is the thrust of the applicant's position. We further find and conclude that the facts set forth in para. 20, *supra*, which have been officially recognized by the Board, contradict the thrust of the applicant's showing. Moreover, the findings at para. 20, *supra*, also contradict Ott Sedwick's opinion, based upon his alleged surveys of community leaders, that there is "very little unemployment", and that "the low unemployment rate results in less people being on welfare, than in other areas of the country." Surely, the 6.5% unemployment rate [23] and the 9.7% [24] rate of families in Ellwood City with incomes less than the poverty level

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[19] We do not adopt Jud's proposed findings at para. 88 that "In advance of the survey, [Ott] Sedwick obtained lists of fraternal organizations, civic groups, unions, and industries and their officers and leaders." Examination of the transcript at page 665 establishes that when he was interrogated concerning the basis of this statement, he relied upon an addendum attached to Jud Exh. 2 entitled "Sources". The face of that addendum is devoid of any description which directly or inferentially implies the inclusion of a roster of officers and community leaders. At most, items 8, 12, 13, and 16 of the addendum describe, generally, such documents as "industrial lists", directory of lodges and clubs, directory of churches, and directory of labor unions. The text of Jud Exh. 2 merely shows the physical existence of such industries, by names of the companies; of unions, by names of the unions; and of civic and fraternal organizations, by names of the organizations. In short, Jud's proposed finding here is unsupported by the record, and we cannot re-label the general descriptions of documents, as set forth in the addendum, into a roster of the names of officers and community leaders.

[20] Q's and A's 10 and 13(a) of the *Primer*; para. 39 of the *Primer*, in pertinent part, reads, as follows:

. . . An applicant may not arbitrarily avoid personal consultations with significant groups because the group lacks a highly developed formal structure. . . . Additional efforts may be needed to identify leaders of less organized groups. This may require . . . asking members of the particular group to identify those who they consider to be their local leaders.

[21] According to Webster's Seventh New Collegiate Dictionary, the word "minority" is defined, as follows: ". . . a part of a population differing from others in some characteristics and often subject to differential treatment."

[22] Para. 31, and Q. & A. 10 of the *Primer* where it is stated that "the 'significance' of a group may rest on several criteria including its size, its influence or lack of influence in the community."

[23] The Board has taken official notice of the national unemployment rate in the 1970 U.S. Census, which is 4.4%. See note 15, *supra*.

[24] The Board has also officially noticed the 10.7% national rate of families with incomes less than the poverty level. See note 15, *supra*.

do not support his opinion that "Ellwood City is not confronted with many of the social problems facing other communities," which stem from these types of community problems,[25] and in any event raise questions with respect to such commonly recognized interrelated community problems as nutrition, health, etc. *Cf.* note 9, *supra.*

26. Although the Board believes that Jud's token approach to the regulatory objectives of the *Primer*, as set forth above, warrant a denial of its application, we have, nevertheless, examined other portions of its showing to determine whether the totality of the evidence would justify a different result. However, careful examination of the record reveals additional serious shortcomings. First, the applicant has also failed to make a *prima facie* showing that the bulk (40 out of 47) of its interviews with alleged community leaders resulted in the establishment of the required dialogue with community leaders. See para. 33, Q. & A. 11(a) of the *Primer*. Secondly, the applicant's survey of the public is haphazard, and cannot be deemed a random selection. See para. 36, Q. & A. 11(b) of the *Primer*. Thirdly, the applicant's survey of the four contiguous communities, namely, Wampum Borough, Wayne Township, Franklin Township, and Ellport Borough, situated in the Greater Ellwood City Area which it proposes to serve, is, at best, a token approach. With respect to the other communities in its proposed service area, Jud does not propose to serve them. (See, para. 21, *supra.*) Hence, the applicant made no survey whatsoever (a) in three Greater Ellwood City Area communities, namely, Big Beaver, Koppel, New Beaver; and (b) in the other communities situated outside of the Greater Ellwood City Area, including New Castle,[26] which is the county seat of Lawrence County where the Greater Ellwood City Area is located. However, for some unexplained reason, Ott Sedwick extended his token-type surveys to North Sewickley Township and Perry Township even though the applicant does not propose to serve these two contiguous communities. Jud also failed to make the required showing as to why it does not undertake to serve, at the least, all of the communities which constitute the Greater Ellwood City Area. Each of these additional deficiencies is discussed more fully below.

27. Given the stated purpose of Q. & A. 11(a) of the *Primer*, requiring consultations with community leaders in order to assure that "dialogue is established between the community leaders and the decision-making personnel of the applicant", the applicant's barebone assertion that 40 of its interviews (or 83% of its total interviews) were made by telephone, accords no decisional authority with reasonable assurance of the fulfillment of this objective. This record is devoid of evidence as to the details of these telephone interviews, except that the applicant utilized a highly detailed questionnaire sheet

[25] There is no list, *per se*, submitted in this record of *all problems* ascertained by Jud based upon its alleged survey of community leaders, as required by para. 54, Q. & A. 22 of the *Primer*. In its proposed findings (para. 90), counsel attempts to categorize the information in the 200 pages of bulk data. However, this is no substitute for the required evidentiary showing; counsel's belated attempt cannot be accepted. In addition, counsel's categorizations are not all inclusive of some of the community problems revealed in the interview sheets.

[26] Ott Sedwick testified that New Castle was not surveyed because it already had an AM license there. Note 16, *supra*. However, it is possible that county officials would have had some constructive suggestions relative to county needs, interests and problems, apart from information relating solely to New Castle.

supplied by its counsel, which, on its face, was intended to be filled-in by the interviewee [27] because the questions patently required reflective thinking. Whether the telephone contact was followed by mailing the questionnaire sheet to the interviewee is not revealed; nor is there any evidence which indicates that Ott Sedwick, with respect to his alleged community leader telephone contacts, did not, in fact, follow the same procedure he utilized in connection with his seven face-to-face interviews, where he read these comprehensive questions to the interviewee, filling-in the responses in his own handwriting, irrespective of the face of the interview sheet which calls upon the interviewee to complete it. (Note 29, *supra.*) Although the Board does not find that Ott Sedwick, in fact, conducted his 40 telephone interviews on the same basis as his seven face-to-face interviews, there is some evidence in this record which would support such a finding.[28] More importantly, there are other circumstances here which cast doubt on the efficacy of the telephone interviews accomplishing the establishment of a dialogue between the community leaders and the applicant. Ott Sedwick stands in the position of a stranger to Ellwood City (note 8, *supra*) and the other communities in the Greater Ellwood City Area, and telephone interviews, of necessity, result in "stranger-to-stranger" conversations, a fact which precludes assumptions that (a) constructive information relating to community problems would, likely, be elicited; and (b) a dialogue would, likely, be established. We, accordingly, conclude that Jud has not made a *prima facie* showing—with sufficient clarity and specificity—to provide us with a reasonable basis for judgment that its 40 telephone interviews, under the circumstances here, resulted in the establishment of the required dialogue with alleged community leaders. Hence, we do not attach substantial weight to these 40 telephone interviews of alleged community leaders.

28. Turning to Ott Sedwick's March 1970 survey of the general public, this survey does not constitute a random selection as prescribed by Q. & A. 13(b) of the *Primer;* at best, Jud's methodology is haphazard. Succinctly stated, two employees of Jud's CATV systems in Ellwood City were utilized to interview 222 members of the general public as they came in that office to pay for their CATV service. At the time of the hearing, the Ellwood City CATV system had approximately 2,500 subscribers, constituting approximately 25% of Ellwood City's population. Admittedly, this is a substantial number of subscribers; however, it is not tantamount to the random selection provided by a city directory or by a telephone directory. As shown above, approximately 9.7% of the families of Ellwood City are below poverty level; it therefore cannot be reasonably assumed that these persons are CATV subscribers. Thus, using a sampling technique limited to those paying their bills for CATV services, so to speak over the counter at the CATV office, does not include subscribers who mail in their payments, and it totally disregards those in the poverty level who

[27] The introductory paragraph of the questionnaire reads, in part, as follows:
Your response, detailed with as much specificity as possible, will help the applicant fulfill . . . objectives . . . . (Emphasis supplied.)

[28] For example, there is a similarity in the handwriting appearing in the text of more than seven of the interview sheets. As indicated above, Sedwick admittedly filled-in the questionnaire on his seven face-to-face interviews.

are unlikely CATV subscribers. Hence, we do not attach substantial weight to Jud's survey of the general public.

29. Ott Sedwick testified that in selecting the major communities to be served, the applicant did not consult any maps, and confined its proposal to communities "adjacent" to Ellwood City. As shown by para. 21, *supra*, the communities of Perry Township and North Sewickly Township are contiguous to Ellwood City; however, they are not proposed to be served by the applicant. The communities of Big Beaver, Koppel, and New Beaver, are situated in the Greater Ellwood City Area at distances no more than four miles from Ellwood City, but they, too, were excluded by the applicant in its selection of its major communities to be served. Given the clear regulatory objective set forth in Q. & A. 6 and paras. 20–24 of the *Primer*, that an applicant has a secondary obligation to serve major communities outside of its city of license and to ascertain problems in those communities, Jud has failed to make the acceptable showing prescribed by Q. & A. 6 as to why it does not undertake to serve, at the least, all of the communities which constitute the Greater Ellwood City Area. See paras. 15, 16 and 21, *supra*. As indicated in para. 16, *supra*, this record is devoid of evidence establishing the homogeneity of the populations of these communities; each community also has its own separate government. Moreover, Ott Sedwick's explanation that communities outside the Greater Ellwood City Area, such as New Castle and many of the other communities surrounding the area, as identified in para. 21, *supra*, have their own AM stations, is simply inaccurate. While New Castle does have two stations, the other communities have none.

30. After the issuance of the Commission's *Primer* and in May 1971, Jud updated its March 1970 survey by re-contacting eight of the persons previously interviewed, and by slightly modifying its program proposal.[29] However, Jud made no effort to correct the basic deficiences of its showing here despite the fact that the totality of the evidence in this record is afflicted patently with ambiguousness, vagueness, if not evasiveness, in contract to the requirements of the proposed *Primer* or the final *Primer*, which provide, at the least, for submissions by applicants with specificity and clarity.

31. As indicated in our preliminary statement, the mere fact that the regulatory objectives of the *Primer* are not codified into the Commission's rules cannot be construed as an invitation effectively to ignore them. In our view, this record establishes that in all major respects Jud ignored these objectives.[30] Jud has also, on the basis of its haphazard showing, in effect, rejected these objectives. And on the basis of its haphazard showing, this record provides no reasonable basis for judgment that (a) Jud has a reasonable awareness of community problems; (b) Jud has established a dialogue with community

[29] Jud filed an amendment to update its March 1970 survey, and it was allowed over the objections of Media. At the time the Commission released its final *Primer* on February 23, 1971, it accorded parties to proceedings involving *Suburban* issues a 90-day period to amend their applications to conform to the final *Primer*. Jud's amendment was filed on May 28, 1971, and was apparently allowed by the Judge because of the right accorded to parties to amend where an issue is a disqualifying one.

[30] *Cf. Voice of Dixie, Inc.* (Docket No. 18664, FCC 73R ——) which has been simultaneously adopted by the Board on the same date as the subject decision. See also *Childress Broadcasting Corporation*, 37 FCC 2d 766, 25 RR 2d 711 (1972), rev. denied, FCC 73–433, released May 2, 1973.

leaders in the Greater Ellwood City Area; (c) Jud has explained its failure to serve all of the communities in the Greater Ellwood City Area; and (d) Jud has accepted its public responsibility role as a broadcast licensee "to meet, aid in meeting, be responsive to, or stimulate the solution for, community problems." See Q. & A. 3 of the *Primer*. In this connection, we have also examined this record to determine whether Jud's showing relating to the manner in which it proposes to meet community problems has been made—with sufficient clarity and specificity—to provide us with a reasonable basis for judgment that its proposed programming demonstrates the applicant's acceptance of its public responsibility role.

32. The applicant proposes "This Is Ellwood City", which would be broadcast from 10:00 a.m. to 10:15 a.m. and 3:00 p.m. to 3:15 p.m., seven days a week, totaling three and one-half hours of programming per week, and consisting of a flexible format intended to be all encompassing to meet the community needs which were ascertained on the basis of its inadequate surveys. News programs will total 14 hours weekly, and will be devoted, in part, to these community problems. A program entitled "It's Happening in Ellwood City" (five minutes daily) is proposed to permit the various organizations in Ellwood City to inform the community of events and occurrences of area-wide interest in the form of public service announcements. "The World of Books" is a 30-minute program to be broadcast on Saturday, in cooperation with the Ellwood City Library. The station will commence each day's programming with a devotional message to be supplied on a rotating basis by area clergymen.

33. The applicant proposes no specific educational, religious or instructional programs,[31] but it does propose that seven hours of the station's time (or 8.3%) will be devoted to all other programs, exclusive of entertainment and sports. As shown by para. 10, *supra*, this is the proposal set forth in Jud's original 1967 application which was signed by Jay Sedwick, secretary. However, Ott Sedwick, as a director, treasurer, 0.2% stockholder and the proposed general manager, testified that although he held these positions in the company in 1967 when the original application was signed, he did not become involved in the applicant's surveys or program planning until he conducted the March 1970 survey. Nevertheless, Ott Sedwick appeared as Jud's sole witness in this proceeding with respect to its surveys and program proposal, and was unable to state what type of programs are intended to fill this seven-hour weekly period. In explanation, he stated that the station manager will be in charge of "the day-to-day operational policies of the station",[32] reporting directly to him, as general manager and treasurer, and it will be the station manager's responsibility, subject to his approval, to determine the types of programs which will be broadcast. (Tr. 752–755.) Without engaging in a discourse concerning this explanation, we believe it to be sheer nonsense [33] when an officer, director and general manager is unable to state on a record—with

[31] *Cf.* note 9, *supra*.
[32] Para. 10, *supra*.
[33] Jud's circumlocution in this respect is also shown by para. 31 of its reply findings where it is stated that Ott Sedwick "was unable to supply detailed answers to certain questions because they were beyond the scope of the authority he will assume in Ellwood City"; and that "day-to-day supervision of operations and programming are to be left to a station manager."

specificity and clarity—the proposed programs which will be broadcast for 8.3% of the station's time.

34. In short, it is our view that aside from the other deficiencies in its *Suburban* showing, the generalities, and vagueness, of the applicant's program proposal, on its face, do not constitute a convincing showing of its acceptance of its public responsibility role as a broadcast licensee. In reaching this conclusion, we have also considered Ott Sedwick's testimony that "there are obvious limitations regarding what a daytime only station in a small community can do to help meet community needs", where the proposed station "has a limited budget" for staff and for programming because anticipated revenues are only $62,000 for the first year. Again, Ott Sedwick's testimony is obscure, for he makes no mention whatsoever of the interrelationship of Jud's financial proposal for construction and first-year operation to its budget for staffing and for programming. Succinctly stated, Jud's financial proposal for construction costs and first-year operation is thinly structured; it proposes to finance the construction and first-year operating costs with a bank loan of $100,000, and a $35,000 line of credit from an equipment supplier.[34] Without interrelating debt payments to its budget, his testimony, which refers merely to budget limitations for staff and for programming, is entitled to no weight, and in any event is irrelevant to Jud's failure to meet its burden of proof under the *Suburban* issue.

35. Finally, no decision would be complete in this case without an observation concerning (a) the import of the late Judge's conclusion at para. 16 of the Initial Decision that "good intention or no, an applicant should not be allowed cavalierly to play the irresponsible hob with the Commission's rules and procedures in a 'you can't catch me' abandon", and (b) Jud's exception challenging this conclusion, as a matter of law, in the context of the Sections 1.65 and 1.514(a) issues in this proceeding. For the reasons already set forth in para. 4, *supra*, we agree with Jud that the record does not justify this conclusion in the context of the Sections 1.65 and 1.514(a) issues; however, our detailed findings set forth above on the *Suburban* issue, compel our agreement with the thrust of the Judge's conclusion, and we adopt it, in substance.

36. In view of all of the above, it is the Board's ultimate conclusion that a grant of Jud's application would not serve the public interest. It is further concluded that a grant of Media's application would serve the public interest.

37. Accordingly, IT IS ORDERED, That the application of Media, Inc., for a construction permit at Youngstown, Ohio, IS GRANTED, subject to the following conditions:[35]

1. That the pattern will be adjusted as near as possible to the theoretical, including control of the RMS of the pattern at not more than 90 mv/m by the insertion, if required, of an appropriate limiting resistor at the common point.
2. That a monitoring point be established on a bearing of 297.5° True to be measured each week.

[34] The Board has officially noticed Jud's amendment, filed May 9, 1969, to this effect. See, note 15, *supra*.
[35] See paras. 77 and 78 of the Initial Decision, and the designation Order.

3. That a Potomac Instruments Type AM–19 phase monitor shall be installed. However, the Precision Monitor Adapter, Type PMA–19, will also be included in the event the Commission includes such a specification in the construction permit.

4. That the phasing and coupling equipment shall include switching provision for non-directional operation.

5. That temperature stabilized transmission lines and sampling lines shall be installed.

6. That the sampling lines installed shall be of equal length.

7. Submission by the permittee of data made in accordance with Sections 73.48 and 2.579 of the Commission's rules for type acceptance of the proposed transmitter for 250 watts.

38. IT IS FURTHER ORDERED, That the application of Jud, Incorporated (BP–17749), for a construction permit at Ellwood City, Pennsylvania, IS DENIED.

39. IT IS FURTHER ORDERED, That the petitions for leave to amend of Jud, Incorporated, dated March 15, 1973, and April 3, 1973, respectively, ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
SYLVIA D. KESSLER, *Member, Review Board.*

APPENDIX

RULINGS ON EXCEPTIONS

MEDIA, INC.

Exception No.	*Ruling*
1, 2	*Granted* only to the extent indicated, otherwise *denied.* Jud's consulting engineer made two trips to Ellwood City during the preparation of the Rule 73.188(b)(1)[1] 25 mv/m coverage exhibit. He joined with Mr. William F. Bell, a civil engineer who is Borough Manager and Borough Engineer for Ellwood City, in determining the location of the central business district of Ellwood City. The Jud proposed 25 mv/m contour would cover 100 percent of the Ellwood City central business district. During the hearing the question of coverage of the factory areas was raised, and Mr. Bell, appearing as an expert witness, testified as to the location of the Ellwood City factories. The factories are located on the east and west sides of the central business district. At the request of counsel for the Broadcast Bureau, Jud's consulting engineer and Mr. Bell, during a recess, studied the percentage of the actual industrial area of Ellwood City which lies within Jud's 25 mv/m contour. Jud's consulting engineer then testified (Tr. 267–8) that, as a result of their studies, it was their determination that 99 percent of the factory area is within the 25 mv/m contour. Later during the hearing (Tr. 290 *et seq.*) Mr. Bell made modifications on page 9 of Jud Exh. 10, which consists of a map on which, *inter alia,* is depicted the location of Jud's proposed 25 mv/m contour in relation to Ellwood City and adjacent areas. Mr. Bell outlined in red on the map two areas which he described as factory areas (Tr. 295/17, 297/10), and he testified as to the types of buildings in these areas. Because the outlining was done in free hand, without the use of instruments, on a small

[1] Rule 73.188(b)(1) reads, in pertinent part, as follows:
(b) The site selected should meet the following conditions: (1) A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city.

Exception No.	*Ruling*
	map, he declined (Tr. 294/3, 298/7) to agree with a statement by counsel for Media that it looked like 20 percent of the factory area lay outside of the 25 mv/m contour, only stating that on his map it looked like 10 percent, and that on another map it might look like two or three percent. (Tr. 298/7) Despite a diligent search, this reviewing authority has been unable to find in the record of this proceeding this modified map, which served as the basis for the foregoing testimony, and must conclude that it has not been made a part of the record. Despite this evidentiary omission and the consequent added burden in reviewing this proceeding, the exhibits herein, in conjunction with the extensive pertinent testimony, provide evidence which establishes that Jud's proposal would provide a 25 mv/m signal to substantially all of the business and factory areas of Ellwood City. Contrary to the implication in the misstatement of Media in its Exception No. 2, Mr. Bell, who established on the record that his knowledge of the zoning and usage of land in Ellwood City and its vicinity is extensive and accurate, did not concede "that the 25 mv/m contour proposed by Jud bisects the principal factory area." Nor does Media's transcript cite support its contention. Mr. Bell's testimony (Tr. 290–292) identifies cross-hatched areas located southeast of the word "Ellicott City" on the map on page 9 of Jud Exh. 10, as a tube mill, and an old Blaw Knox building that now is part of the White Industries. South of the Lawrence County-Beaver County line is an old plumbing warehouse that now is a factory-type building. On the northwestern area, on the north side of Factory Avenue (which is identified by name on the maps on pages 5, 7 and 8 of Jud Exh. 10), are buildings of the Mathews Conveyor Company, Division of Rex Chainbelt, Inc. (Tr. 291). Mr. Bell identified buildings adjacent to but outside the 25 mv/m contour in this northwestern area as being storage buildings for the Mathews Conveyor Company (Tr. 273, Tr. 291–292). Mr. Bell also identified additional buildings located within the 25 mv/m contour which are occupied by good-sized manufacturing companies (Tr. 292/14). As exceptor, Media notes (Exception 7D) the factory area beyond Jud's proposed 25 mv/m contour contains portions of the Mathews Conveyor Company buildings. However, the factory area involved is small (the distance scale appearing on page 9, of Jud Exh. 10, establishes that the buildings are encompassed by an area less than 1000 feet on a side) and the buildings are used for storage purposes.
3 (A), (B), (C), 8, and 9.	*Denied* for the reasons set forth in para. 4 of this Decision.
3(D)	*Denied.* Although Jud should have filed this information, it cannot be faulted for these omissions, standing alone.
4, 5, 10	*Granted*, in substance, for the reasons stated in paras. 12–35 of this Decision. However, contrary to Media's exceptions, there is no evidence in this record which indicates that Jud proposes to provide a service to largely rural agricultural areas. Quite to the contrary, the evidence establishes that Ellwood City is industrialized.
6, 7	*Denied.* The conclusion of the Administrative Law Judge is reasonable and is supported by the record. The record establishes that the factory buildings located in the small area not encompassed by Jud's 25 mv/m contour are used for storage purposes. In the circumstances of this case where, among other things, Jud would bring a first local

Exception No.	*Ruling*
	standard broadcast station to Ellwood City, it would be inequitable to demand strict compliance with the provisions of Rule 73.188(b)(1), and waiver of that Rule would be warranted if Jud's other qualifications had been established on this record. *Community Broadcasting Co. of Hartsville*, 32 FCC 2d 803 (1971); *Broadcasting, Inc.*, 20 FCC 2d 713, 17 RR 2d 1117 (1969); *KDEF Broadcasting Co.*, 30 FCC 635 (1961); *Manchester Broadcasting Co.*, 24 FCC 199 (1958); *Reilly and Spates*, 14 RR 985 (1958) and cases cited therein.
11	*Granted*. See paras. 1 and 3 of this Decision.
12, 13	*Granted*, to the extent that Jud has been found to be disqualified under the *Suburban* issue only. *Denied* with respect to the other two qualifying issues.
14	*Granted*. See paras. 36 and 37 of this Decision.
	JUD, INCORPORATED
1, 2, 3	*Granted* in substance. See para. 4 of this Decision.
4, 5	*Granted*, in part, and to the extent that the Judge misconstrued the Bureau's position, and erred in reaching the Section 307(b) issue. See paras. 1 and 3 of this Decision. *Denied*, in part, and to the extent that Jud seeks a finding and conclusion that it has established its qualifications, for the reasons fully set forth in our Decision.
6	*Denied*, in substance. See paras. 1, 3 and 35 of this Decision.
	BROADCAST BUREAU
1	*Granted*, in substance. See our ruling on Jud's Exception Nos. 2 and 3.
2	*Granted* in part, *denied* in part. See our ruling on Jud's Exception No. 4.
3	*Denied*. See our ruling on Jud's Exception No. 6.

F.C.C. 72D-6

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of MEDIA, INC., YOUNGSTOWN, OHIO	Docket No. 18768 File No. BP-17435
JUD, INC., ELLWOOD CITY, PA. For Construction Permits	Docket No. 18769 File No. BP-17749

APPEARANCES

Robert W. Healy (Putbrese & Healy) on behalf of Media, Inc.; *Lewis I. Cohen* and *Edward R. Wholl* (Cohen & Berfield) on behalf of Jud, Incorporated; *Frank U. Fletcher* and *Marvin Rosenberg* (Fletcher, Heald, Rowell, Kenehan & Hildreth) on behalf of Hubbard Broadcasting, Inc.; and *Jay L. Witkin* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER CHARLES J. FREDERICK

(Issued January 25, 1972; Released January 28, 1972)

PRELIMINARY STATEMENT

1. This proceeding concerns the mutually exclusive applications of Media, Inc. (Media) and Jud, Incorporated (Jud) for new standard broadcast stations located in Youngstown, Ohio and Ellwood City, Pennsylvania, respectively. By Memorandum Opinion and Order (FCC 69-1362, 20 FCC 2d 937), the Commission designated these applications for hearing on the following issues:

1. To determine the areas and populations which would receive primary service from the proposed operations and the availability of other primary service to such areas and populations.

2. To determine whether the proposal of Jud, Inc., would provide coverage of the city sought to be served, as required by Section 73.188(b)(1) of the Commission's Rules, and, if not, whether circumstances exist which would warrant a waiver of said Section.

3. To determine whether the proposal of Media, Inc., would provide coverage to the city sought to be served, as required by Section 73.188(b)(2) of the Commission's Rules, and, if not, whether circumstances exist which would warrant a waiver of said Section.

4. To determine whether a grant of the application of Media, Inc., would contravene the Commission's policy requiring divorcement of interests between stations in the same broadcast service and serving substantially the same area.

5. To determine the efforts made by Jud Inc., to ascertain the community needs and interests of the areas to be served, and the means by which it proposes to meet those needs and interests.

6. To determine, in the light of Section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.

7. To determine, in the light of evidence adduced pursuant to the foregoing issues, which, if either, of the applications should be granted.

2. On May 5, 1970, by Memorandum Opinion and Order (FCC 70R–164, 22 FCC 2d 875), the Review Board added the following issue in response to a petition to enlarge filed by Media:

"To determine whether Jud, Incorporated, failed to amend its application as required by Section 1.65 of the Commission's Rules; and if so, to determine the effect thereof upon the applicant's qualifications to be a Commission licensee."

The Board placed the burden of proceeding with the introduction of evidence on Media, and placed the burden of proof on Jud.

3. Subsequently, on June 9, 1970, by Memorandum Opinion and Order (FCC 70R–198), the Review Board added the following issue against Media at the request of Jud:

(a) To determine whether Media, Inc. can adjust and maintain its directional antenna system as proposed.

(b) To determine whether Media, Inc.'s proposal will cause objectionable interference to Station KSTP, St. Paul, Minnesota.

The Board placed both the burden of proceeding and the burden of proof upon Media. In addition, Hubbard Broadcasting, Inc. (Hubbard) was made a party to the proceeding.

4. Finally, by Memorandum Opinion and Order (FCC 70R–317, 25 FCC 2d 625), released September 10, 1970, the Review Board added the following issue:

"To determine whether Jud, Incorporated has failed to report requisite information in its application, as required by Section 1.514(a) of the Commission Rules; and, if so, to determine the effect thereof upon the applicant's qualifications to be a Commission licensee."

The burden of proceeding under this issue was placed on Media; the burden of proof was placed on Jud.

5. The following witnesses testified in the proceeding:

Media

John T. Galanses, vice-president, general manager, Media, Inc.
C. Harold Munn, consulting engineer.
Edward Lorentz, consulting engineer.

Jud

Serge Bergen, consulting engineer.
Ott L. Sedwick, treasurer, Jud, Inc.
Stephen Rubino, president, Ellwood City Borough Council.
William F. Bell, borough manager and borough engineer, Ellwood City.
Jay Sedwick, secretary, Jud, Inc.

FINDINGS OF FACT

Technical Issues

6. Media, Inc. seeks authorization to construct a new Class II station at Youngstown, Ohio on 1500 kHz with 500 watts power, daytime only, employing 250 watts power during critical hours. Different directional antennas would be used for each period. Jud, Incorporated proposes to construct a new Class III station at Ellwood City, Pennsylvania on 1500 kHz with 250 watts power, daytime only, with a directional antenna. The two applications are mutually exclusive.

7. Youngstown, Ohio has a 1970 population of 139,788.[1] It is the county seat of Mahoning County (pop. 303,424) and one of the central cities in the Youngstown-Warren Metropolitan Statistical Area which is comprised of Mahoning and Trumbull Counties. The SMSA has a population of 536,003. Youngstown has three AM stations, WBBW (1240 kHz, 250 W, 1 Kw-LS, U, IV), WKBN (570 kHz, 5 Kw, DA–N, U, III) and WFMJ (1390 kHz, 5 Kw, DA–N–U, III); four FM stations, WBBW–FM (93.3 MHz, 14.5 Kw, 280 ft., B), WKBN–FM (98.9 MHz, 50 Kw, 540 ft., B), WRED (101.1 MHz, 24.5 Kw, 110 ft., B), and WYSU (88.5 MHz, 22.5 Kw, 110 ft., E); and three TV stations, WFMJ–TV (Ch. 21, 263 Kw, 990 ft.), WKBN–TV (Ch. 27, 462 Kw, 630 ft.) and WYTV (Ch. 33, 209 Kw, 580 ft.).

8. Using radiation values from the proposed directional antenna patterns in conjunction with ground conductivity for the area taken from Figure M–3 of the Rules, Media's proposed coverage is as follows:

Contour (mv/m)	Population	Area (square miles)
Daytime:		
2.0	480,764	516
0.5	624,370	1,727
Critical hours:		
2.0	390,271	355
0.5	515,944	1,178

9. All rural areas within the proposed primary service area receive primary service (0.5 mv/m or greater) from Stations WKBN and WFMJ, Youngstown; WHLO, Akron; WPIC, Sharon, Pennsylvania; KDKA, Pittsburgh; and WKYC, Cleveland. Urban areas within the proposed primary service area, including the city of Youngstown, receive primary service (2.0 mv/m or greater) from Stations WKBN, WBBW, and WFMJ, Youngstown, WSOM, Salem, Ohio, and WPIC, Sharon, Pennsylvania.

Coverage of the City of Youngstown (Section 73.188(b)(2))

10. The proposed Media transmitter site is located in the extreme eastern part of Youngstown about 0.6 mile from the city boundary. The directional antenna patterns for operation during daytime and critical hours are each drawn into a sharp minimum value of radiation in a northerly direction so that the proposed 5.0 mv/m contour during each mode of operation falls within the city of Youngstown, forming two triangular shaped areas in the northeastern sector of the city that would not receive 5.0 mv/m service. The area not covered by the 5.0 mv/m contour during daytime hours contains 58 persons in 0.032 square mile representing 0.03% of the total 1960 population (166,689 persons), and 0.09% of the total land area (34.76 square miles) of Youngstown. During critical hours, the area not covered by the proposed 5.0 mv/m contour contains 561 persons in 0.2 square mile, or 0.34% of the total 1960 population and 0.57% of the total land area of

[1] Population figures for cities and counties are taken from 1970 U.S. Census, Advance Reports. Coverage figures for the two applicants are based on 1960 U.S. Census data.

Youngstown. Thus, the daytime 5.0 mv/m contour covers 99.97% of the population and 99.01% of the area of the city and the 5.0 mv/m contour during critical hours covers 99.66% of the population and 99.43% of the area of the city. Since the areas not covered by the 5.0 mv/m contour were counted on the basis of 1960 U.S. Census, the 1960 population of Youngstown is used in this instance.

Adjusting and Maintaining the Proposed Directional Antenna Systems

11. Each of the two directional antenna systems consists in four towers arranged in a portion of an arc. The respective parameters and physical dimensions are as follows:

Tower	Spacing (degrees)	Electrical height (degrees)	Current ratio	Phasing (degrees)
	DAYTIME			
East	Reference	90	1.0	0
West	90	90	2.0976	191.715
West-northwest	179	90	1.6849	9.8906
Northwest	264.5	90	.6250	−164.5
	CRITICAL HOURS			
East	90	90	1.0	0
West	179	90	2.06219	211.679
West-northwest	264.5	90	1.37932	47.628
Northwest		90	.32	−100.0

The daytime pattern has a figure eight configuration with the two major lobes directed to the east and west. It contains one null at 338 degrees true. The critical hours pattern has a major lobe directed to the west and a minor lobe directed to the east with one null at 359 degrees true.

12. The proposed transmitter site of Media is located on the northern shore of McKelvey Lake. A substation operated by the Ohio Edison Company is situated on the west side of the lake about 0.6 mile west of the proposed transmitter site. A high voltage electrical transmission line mounted on steel towers runs from the substation in an easterly direction along the southern shore of the lake and passes within 0.2 mile of the southern boundary of the transmitter site. In this area, the lake turns southward so that the transmission line crosses the lake near its center. Twelve steel towers are located in the vicinity of the site at distances ranging from 0.2 to 0.6 mile from the nearest site boundary. They vary in height from 74 ft. to 100 ft. Media's consulting engineer stated that, in the event detuning should be required, it is proposed to accomplish this by installation of leg-skirts of No. 12 copperweld wire on any reradiating tower, mounted on standoff insulators, and connected together near the tower base where they would be contacting the tower through a reactance network which is adjusted to provide minimum radiation. It is estimated that the installation cost per tower would be $359.00 and that the network adjustment cost per tower would be $60.00 for a maximum expenditure of $5,028.00.

13. In a letter dated January 15, 1970 from the General Supervisor of Transmission Lines of the Ohio Edison Company, it is stated that "the Ohio Edison Company will cooperate in detuning these towers as required, at your expense, if a mutually agreeable and practical method can be found for doing so."

14. A second consulting engineer for Media submitted a stability study for the two proposed directional antenna patterns. During critical hours, it was determined that, if the antenna parameters are varied in the worst combination with respect to the reference tower (tower with highest field) as much as 1% in current ratio and 1° in phase, the MEOV's toward Station KSTP, St. Paul, Minnesota, would be exceeded by 0.125 mv/m in the direction of 283 degrees true, by 0.143 mv/m in the direction of 289 degrees true, and by 0.722 mv/m in the direction of 297 degrees true, but would not be exceeded in the direction of 302.2 degrees true. In this study, the pattern RMS and the multiplying factor (K factor) in the mathematical formula were held constant. He found in some instances, when the parameters were varied to this extent, the pattern RMS did not change significantly but the multiplying factor did. Using this approach, he inserted the change in multiplying factor in the formula and found that the MEOV's in all four of the above directions would not be exceeded with variations in parameters of 1% and 1°, and, in fact, variations of 5% and 2° would be permissible. In other directions around the pattern, including the azimuths 20, 32.5, 50, 96, 153.8, 340, and 359 degrees true, variations of 1% and 1° were found permissible without giving consideration to any change in the multiplying factor. For the daytime pattern, variations of 1% and 1° were found permissible in the directions of 0, 22, 60, 100, 150, 170, 187, and 338 degrees true without considering the change in multiplying factor but not in the direction of 208 degrees true. Between 201 and 215 degrees true, variations of 0.5% and 0.5° were found permissible with and without consideration of the change in multiplying factor. The engineer pointed out that variations in an array can increase radiation to a lesser degree or even decrease it. He claimed that neither of the proposed radiation patterns involves deep suppression, paricularly when comparing the minimum MEOV to the pattern RMS, for the minimum MEOV on the critical hours pattern of 23.4 mv/m is 26% of the pattern RMS of 90 mv/m and the minimum MEOV on the daytime pattern of 50 mv/m is 39% of the pattern RMS of 128.75 mv/m.

15. He noted that theoretical studies indicate the base operating resistance of some of the elements of the antenna system for both the critical hours pattern and the daytime pattern will be negative, but claimed that this fact does not mean that the radiation patterns cannot be adjusted and maintained. He recognized that it does mean, however, that the antenna and ground system, the phasing and coupling systems and the monitoring system must be designed and installed in the best manner possible using the highest quality components and materials as is possible to insure stability as well as to permit control of the system operating parameters. If this is done, he believed that the radiation patterns proposed can be adjusted and maintained so as not to exceed the maximum expected operating values specified. Media and

Hubbard have stipulated to the following between themselves in reference to Media's critical hours pattern:

1. That the pattern will be adjusted as near as possible to the theoretical including control of the RMS of the pattern at not more than 90 mv/m by the insertion, if required, of an appropriate limiting resistor at the common point.
2. That a monitoring point be established on a bearing of 297.5° true to be measured each week.
3. That a Potomac Instruments Type AM–19 phase monitor shall be installed. However, the Precision Monitor Adapter, Type PMA–19, will also be included in the event the Commission includes such a specification in the construction permit.
4. That the phasing and coupling equipment shall include switching provision for nondirectional operation.
5. That temperature stabilized transmission lines and sampling lines shall be installed.
6. That the sampling lines installed shall be of equal length.

Objectionable Interference to Station KSTP, St. Paul, Minnesota

16. The record reflects that as long as the applicant's radiation remains within the proposed MEOV's, no objectionable interference would be caused to Station KSTP, St. Paul, Minnesota.

17. Ellwood City, Pennsylvania has a 1970 population of 10,857 and is located partly in Lawrence County (pop. 107,374) and partly in Beaver County (pop. 208,418) about 30 miles northwest of Pittsburgh and 20 miles southeast of Youngstown. It is not a part of any urbanized area. Ellwood City has no standard station. However, one FM station, WFEM (92.1 MHz, 3 Kw, 300 ft., Class A) is authorized there. It has no TV station.

18. On the basis of radiation values taken from the proposed directional antenna pattern and ground conductivity values from Figure M–3 of the Rules, the proposed coverage is as follows:

Contour (mv/m)	Population	Area (square miles)
2.0	95,900	213
.5	155,692	850

19. At least five stations, WKBN, WISR, WPIC, KDKA, and WKST, provide primary service (0.5 mv/m or greater) to all of the rural areas proposed to be served and at least five stations, WKBN, WPIC, KDKA, WBZY, and WKST, provide primary service (2.0 mv/m or greater) to the urban areas which include the two communities of Ellwood City and New Castle.

Coverage Within The Proposed 25 mv/m Contour (Section 73.188 (b)(1))

20. The proposed 25 mv/m contour of Jud covers all of the central business district and about 90% of the factory areas of Ellwood City.

Common Service Area

21. Youngstown, Ohio and Ellwood City, Pennsylvania are separated by a distance of some 20 miles at the closest limits and the two proposed transmitter sites are 25 miles apart. The 0.5 mv/m contours of the two proposals overlap to the extent that about 30% of the primary service area within the 0.5 mv/m contour of Media is dupli-

cated by Jud and about 40% of Jud's area is duplicated by Media. There is no overlap of the proposed 2.0 mv/m contours and neither applicant provides primary service (2.0 mv/m or greater) to the community of the other.

Nontechnical Issues

DIVORCEMENT OF INTERESTS ISSUE (MEDIA)

22. The application of Media, Inc. was filed on September 2, 1966. In Table II of that application, John T. Galanses is listed as an announcer and engineer at WHOT in Youngstown, Ohio, "1966– ." In addition, in Question 19 of Section II, page 5 of the application, these same facts are listed as Galanses' previous broadcast experience (official notice requested). The fact clearly is that he has not been with WHOT or WRED since September, 1966.

23. Galanses is vice-president and general manager of Media. His previous employment record shows that he was a part-time announcer at WBBW in Youngstown, Ohio from 1960–63 and from June to September, 1966, he was an announcer-engineer at WHOT, Campbell, Ohio. In September 1966, Galanses left WHOT and returned to college. In the same month, he took a new job (while attending college) at WNWC in Arlington Heights, Illinois, holding it until June 1967. From June 1967 until August 1969, Galanses was employed at WINW, Canton, Ohio, where he was an announcer and later program director. At present, he is a disc jockey and assistant program director at WEAM, Arlington, Virginia. With the exemption of his connection with Media, Galanses has no association, employment connection, or relationship in any form with any Youngstown area radio, television, or newspaper.

Section 1.65 and Section 1.514 Issues

24. Jud's application in this proceeding was filed with the Commission on May 10, 1967. It was signed by and prepared under the direction of Jay L. Sedwick, the corporation's secretary.

25. The application states that the principals of Jud are as follows: Jud Sedwick, 99.6% stockholder, president, and director; Ned R. Sedwick, .2% stockholder, vice-president and director; Ott L. Sedwick, .2% stockholder, treasurer, and director; and Jay L. Sedwick, secretary. All the principals have been associated with the applicant since its incorporation on August 5, 1960, with the exception of Jay L. Sedwick, who has been secretary since 1966 (official notice of application granted).

26. According to the original application, Jud has investments in real and personal property, including a 50% interest in National Cable Television Corporation, Connellsville, Pennsylvania, an owner and operator of CATV systems. In addition, Jud Sedwick is stated to be a 98% stockholder, president and director of Armstrong Utilities, Inc., Kittanning, Pennsylvania, which is said, in the original application, to be the owner and operator of CATV systems in Butler, Pennsylvania and Orrville, Ohio. It is also stated that Armstrong is in the process of constructing a CATV system in Ellwood City, Pennsylvania.

27. Ned R. Sedwick is listed in the application as a 1% stockholder, vice-president and director of Armstrong Utilities, Inc. In addition, Ott L. Sedwick is listed as a 1% stockholder, secretary-treasurer and director of Armstrong Utilities. Finally, according to the application, Jay L. Sedwick is simply stated to be secretary of Jud, Inc. However, Jay Sedwick has been president and a director of National Cable since 1966, as well as treasurer of Armstrong Utilities since December 1969. Jud did not amend its application until September 17, 1970 to reflect this information concerning Jay Sedwick.

28. National Cable and Armstrong Utilities hold franchises or authorizations to operate a CATV system in the following communities:

Community:	*Date authority issued*
Butler, Pa	Apr. 9, 1963.
Butler Township, Pa	July 20, 1964.
Ellwood City, Pa	Aug. 4, 1966.
Wayne Township, Pa	Apr. 1967 (estimate).
Ellport, Pa	Mar. 5, 1968.
Koppell Boro, Pa	Apr. 23, 1969.
Perry Township, Pa	Nov. 1968 (estimate).
Wampum Boro, Pa	Mar. 13, 1967.
Zelienople, Pa	Nov. 12, 1967.
Evans City, Pa	Jan. 2, 1968.
Orrville, Ohio	Dec. 20, 1965.
Ashland, Ohio	Aug. 20, 1968.
Hamlin, W. Va	Dec. 2, 1968.
W. Hamlin, W. Va	Aug. 4, 1969.
City of Connellsville, Pa	Oct. 26, 1964.
Twp. of Connellsville, Pa	Dec. 6. 1963.
South Connellsville, Pa	Oct. 12, 1964.
Dunbar Township, Pa	Oct. 1, 1963.
Everson, Pa	Oct. 3, 1964.
Mt. Pleasant, Pa	July 15, 1970.
Scottdale, Pa	Jan. 9, 1967.
Dunbar Borough, Pa	July 15, 1970.
Ripley, W. Va	July 21, 1970.

29. Although the applicant merely disclosed that National Cable owned and operated a CATV system in Connellsville, Pa. at the time of the filing of the application, in actuality National Cable also held franchises in the Township of Connellsville, South Connellsville, Dunbar Township, Everson, and Scottdale. Furthermore, although the applicant merely disclosed that Armstrong held franchises at the time of the filing of the application in Butler, Pa. and Orrville, Ohio and was in the process of constructing a CATV system in Ellwood City, in fact, Armstrong also held franchises in Butler Township, Wayne Township, and Wampum Borough (all in Pennsylvania).

30. Since the filing of the Jud application, National Cable has obtained franchises in Mt. Pleasant and Dunbar, Pa. In addition, since the filing of the application, Armstrong Utilities has obtained franchises in Koppell, Perry Township, Evans City, Ellport, Pa.; Ashland and Rittman, Ohio; and Hamlin, West Hamlin, and Ripley, West Virginia.

31. On July 21, 1970, Jud amended its application to reflect the fact that National Cable was granted a franchise to provide CATV service in the Borough of Dunbar in November, 1969. On August 6, 1970, Jud amended its application to show that National Cable was granted a franchise in Mt. Pleasant, Pennsylvania on July 15, 1970;

that Armstrong Utilities was granted a franchise in Ripley, West Virginia on July 21, 1970; and that Armstrong Utilities was granted a franchise in West Hamlin, West Virginia on August 4, 1969. Next, on September 4, 1970, Jud amended its application to show that Armstrong Utilities was granted a franchise in Rittman, Ohio on August 10, 1970.

32. On February 17, 1971, Jud amended its application to disclose that Armstrong Utilities would commence CATV service in Centre Township, Pennsylvania within 35 days. Inasmuch as Centre Township is a second class township, Armstrong was not required to obtain a franchise there. Thereafter, on June 4, 1971, Jud amended its application to show that National Cable will commence CATV service in Mt. Pleasant, Pennsylvania. Finally, on June 15, 1971, Jud amended its application to show that Armstrong will commence CATV service in Zelienople and Evans City, and the Townships of Jackson, Marion, and Lancaster and Cranberry, Pa. after July 2, 1971. Franchises have been obtained for Zelienople and Evans, but not from the others because they are second class townships.

33. In an attempted explanation for Jud's failure to report the existence of all franchises held prior to the filing of its application, Jay Sedwick testified that it was his understanding that he was only required to report the systems in operation or under construction, and that he had received this understanding from counsel. Accordingly, franchises held at the time in Everson and Scottdale, Pa. were not specified in the application. Moreover, in filling out the application, it was also Sedwick's practice to define a CATV system by merely naming the largest major community in which the system operates. In this context, Sedwick noted that the communities of Wayne, Wampum and Ellwood City were served in May 1967 by the same CATV head end; that Orrville, Ohio was served by its own head end in May 1967; and, finally, that Connellsville, the township of Connellsville, South Connellsville, and Dunbar were all served by the same head end on May 11, 1967. Notwithstanding, the Commission's files show that an FCC Form 325 (CATV Information Report) was filed on November 10, 1966 by Ned Sedwick, vice-president of Jud, on behalf of Armstrong Utilities. The report states Armstrong Utilities currently serves Butler and Butler Township, Pennsylvania. In addition, letters of notification were filed for the city of Connellsville, Connellsville Township, Dunbar Township, Scottdale, and South Connellsville in July 1966.

34. In an attempted explanation for his failure to amend the Jud application after 1967 to reflect the acquisition of certain CATV franchises or authorizations, Jay Sedwick testified that he was unaware that it was necessary to amend the application in such a case. Furthermore, he stated that he first became aware of the requirement to report these franchises when the Review Board added a Section 1.65 issue to this proceeding.

35. On November 21, 1968, Jud amended its application in this proceeding on the advice of counsel to reflect the fact that Jud, d/b as Channel 25 TV, Inc., had been assigned call letters WJUD for the construction permit (BPCT-3979) for a new television station

at West Palm Beach, Florida. On July 29, 1969, in a letter from the Chief, Broadcast Bureau, to Jud, Inc., d/b as Channel 25 TV, Inc., the applicant was advised that the construction permit for the new station had been cancelled. Nevertheless, Jud did not amend its application in this proceeding to reflect the dismissal of the WJUD application apparently because Jay Sedwick did not realize he was required to do so.

307(b) Issue

Media

36. Youngstown is located in mid-Eastern Ohio, five miles from the Pennsylvania state line, midway between Pittsburgh and Cleveland. It is the center of the fourth largest steel producing district of the United States.

37. The city operates under a home rule charter form of government. The Mayor, the president of the council, and each of seven councilmen are elected for a term of two years. The Council forms the legislative branch of the government, while the Mayor is the chief executive officer.

38. Youngstown has its own police and fire departments. The Police Department employs 275 men and four women in addition to 24 civilian employees and 68 school guard patrolmen. The Fire Department has 266 men and 26 pieces of equipment at 15 stations throughout the city.

39. The Youngstown Public School System is directed by a board of education elected by the people. The system is composed of 33 elementary schools, six junior high schools and six senior high schools. Youngstown State University has a current enrollment of 14,500 students, with a faculty staff of 750 members. Also, Penn-Ohio Junior College and Youngstown Technological College, with enrollments of 650 and 485, respectively, are located in Youngstown.

40. There are six hospitals in the Youngstown area, of which one is operated by the state and another operated by Mahoning County. Spiritual needs of the area are served by 309 churches, representing the principal Protestant denominations, and Catholic, Jewish, and Eastern Orthodox faiths. Youngstown is the See City of the Youngstown Catholic Diocese.

41. Youngstown was served by the Penn Central, Erie-Lackawanna, and Baltimore and Ohio Railroads, as well as by four smaller lines at the time of the hearing. Official notice is taken that these railroad *names* may not hold as of now. Two major commercial airlines, Allegheny and United, provide service from Youngstown Municipal Airport. In addition, there are 89 motor freight lines serving 57 freight terminals. Two interchanges of the Ohio Turnpike serve Youngstown.

42. Electric power is furnished by Ohio Edison. Other utilities are provided by East Ohio Gas Company, Ohio Bell Telephone Company and the Mahoning Valley Sanitary District.

43. The Youngstown Park and Recreation System covers approximately 2,633 acres, including a public golf course, picnic areas, athletic fields, and six swimming pools. Mill Creek Park, comprising another 2,383 acres, provides additional recreational facilities. Youngstown is also the home of the Butler Institute of American Art. In addition,

Youngstown has numerous civic, fraternal, charitable, social, and educational institutions.

44. There are nearly 300 industries in the Youngstown area, along with thousands of wholesale, retail, and service firms. General Motors has a relatively new plant, completed in 1966. The plant has a payroll of approximately 10,000, making it the country's second largest automobile plant. General Motors has announced that it is expanding the plant to produce a new minicar, so that its total employment will be about 14,000.

45. There is only one newspaper, The Youngstown Vindicator, published daily and Sunday.

46. Bank clearings in Youngstown increased from $58,926,660 in 1958 to $91,606,400 in 1969. Bank deposits rose from $270,049,400 in 1958 to $404,051,300 in 1969. Savings deposits rose from $90,679,000 in 1958 to $173,522,000 in 1969. Finally, postal receipts increased from $195,972,000 in 1958 to $539,178,000 in 1969.

47. The number of telephones increased from 126,672 in 1958 to 182,701 in 1969. Gas meters similarly increased from 77,591 in 1958 to 90,105 in 1969. Finally, electric power sales increased from 44,452,100 Kwh in 1958 to 91,221,700 Kwh in 1969.

48. Between 1960 and 1970, Youngstown suffered a decrease in population from 166,689 to 139,799, representing a 16.1% decrease. Retail sales between 1958 and 1963 fell from $271,584,000 to $245,455,000.

Jud

49. Only ten miles east of the Ohio state line, Ellwood City is 25 miles from Youngstown, Ohio; 90 miles south of Erie, Pennsylvania; 14 miles south of New Castle, Pennsylvania (the county seat of Lawrence County); and 37 miles north of Pittsburgh, Pennsylvania. Ellwood City is bounded by Perry Township, North Sewickley Township, Wayne Township, and Ellport Borough, all of which make up the Greater Ellwood City area.

50. The 1960 population of Ellwood City was 12,413; the 1970 population is 10,857. This represents a 12.5% decrease. According to the 1960 U.S. Census, the median family income was $5,788 per year. About 15.8% of the population earned less than $3,000 per year and 12.8% earned over $10,000 per year.

51. Ellwood City is favorably situated for access to air, rail, and highway transportation facilities. It is four miles from the Beaver Valley Interchange of the Pennsylvania Turnpike, a super highway which links with others to form a continuous express road from Illinois to New Jersey. The West Virginia-Pittsburgh-Erie Freeway, Interstate Seventy-nine is just ten miles to the east.

52. There are also several airports within reach of Ellwood City. The Beaver County Airport is nine miles away; the New Castle Airport is twelve miles away; and Tasa Airport, near Zelienople, Pennsylvania, is approximately eight miles away.

53. Ellwood City is served by two railroads, the Baltimore and Ohio, and the Pittsburgh and Lake Erie. Both railroads provide the large amount of freight service required by the many industries in this area. Neither railroad now provides passenger service. Sixteen motor freight lines serve the area regularly.

54. More than forty industries located in and near Ellwood City together manufacture a host of diversified products or services for both domestic and the foreign markets. The combined annual payroll exceeds fifty million dollars.

55. The community's industries include one basic steel producer, numerous steel fabricators, and a large number of textile, chemical, automotive, building material and related manufacturing plants. Several are engaged in expansion programs.

56. The following industrial plants are located in Ellwood City:

Industry	Product	Employees
Aetna-Standard Engineering Co	Heavy steel mill equipment	760
American Steel Co	Cotter pins	125
Beaver-Advance Corp	Steel scaffolding	135
Ellwood Casting Co	Grey iron and bronze castings	50
Ellwood City Forge Co	Cranksha'ts for diesel engines	310
Ellwood Forge Co	Airplane crankshafts	310
Ellwood Iron & Wire Co	Ornamental iron work	95
Ellwood Safety Appliance	Safety shoe foot guards	30
Ellwood Works—United States Steel	Seamless specialty tubing	1,890
Geo. K. Garrett Co	Washers-hose clamps, etc	155
Mathews Conveyor Co., division of Rex Chainbelt, Inc.	Conveying equipment gravity chutes	859
Ryman Engineering Co	Machine shop equipment	30
Univ. Machine and Valve Manufacturing Co	Valves	100
Guards, Inc	Machinery safety guards	25
Jomar	Decorative pillows	30

57. All utilities are available to the city. In addition, Ellwood City has the Municipal Electric Co., a distribution service owned by the public with other municipal services coming out of the profits.

58. The following labor unions meet in Ellwood City:

Local No. 1220—National Tube Co.
Local No. 1605—Aetna-Stan. Division of Blaw-Knox Co.
Local No. 2262—American Steel Co.
Local No. 2263—Mathews Conveyor Co.
Local No. 2289—National Tube (Salary).
Local No. 5229—Beaver Advance Corp.
Local No. 5230—Precision Metal Products.
Local No. 571—Ellwood Knitting Mill.
A.F.L.-C.I.O.—Council of Law Co.
Local No. 421—Carpenters.
Local No. 596—Journeymen Barbers.
International Brotherhood of Electrical Workers No. 33.
Local No. 227—Building Service Employees International Union.

59. Downtown Ellwood City is the principal shopping area within an eight mile radius. The retail sales figures are as follows:

Total sales in 1969	$31,648,000
Payroll first quarter 1967	580,000
Paid employees, workweek ending Mar. 12, 1967	607
Active proprietors of unincorporated businesses	176

60. The following businesses are located in Ellwood City:

Kind of business	Number of establishments	Sales (in thousands)
Building materials, hardware	7	$1,248
General merchandise group store	5	(1)
Foodstores	29	7,074
Automotive dealers	15	5,426
Gasoline service stations	18	1,353
Apparel, accessory stores	15	1,610
Furniture, home furnishings, equipment stores	11	1,394
Eating and drinking places	31	741
Drugstores, proprietary stores	7	840
Other retail stores	26	1,404
Nonstore retailers	5	(1)
Wholesale trade: [2]		
Merchant wholesalers	4	(1)
Total wholesale trade	6	1,614

[1] (D) Withheld to avoid disclosure (because of small number of businesses in each of the categories).
[2] See the following table:

Payroll, entire year	$81,000
Payroll, workweek ended nearest Nov. 15	1,480
Paid employees, week ended nearest Nov. 15	20

61. No dates are in the record re these two paragraphs next above.

62. There are three banking companies located in Ellwood City, including the First National Bank of Lawrence County, Lawrence Savings and Trust Company, and the Ellwood Federal Savings and Loan Association.

63. The Borough of Ellwood City provides the following services: police department, fire department, sewage treatment plant, free library, and various recreational facilities.

64. The elected government of Ellwood City consists of a mayor and ten councilmen, two from each of the five wards. A borough manager is employed to effectuate the decisions of those elected and to supervise operation of the governmental services provided to the citizens of Ellwood City. The municipal government has 65 full-time employees and an operating budget of $1,300,000.

65. Ellwood City also has a planning commission consisting of five members appointed by the borough council from the local business and professional men. There is also a zoning board of review made up of three men appointed by the council.

66. The Ellwood Consolidated Water Co., a private concern, supplies water to the borough. The borough has its own sewage system. Natural gas is supplied by the Columbia Gas Company and telephone service is by Bell of Pennsylvania.

67. The community has an abundance of recreational facilities, including parks, playgrounds, sporting fields, and wooded areas.

68. Sixty civic and fraternal organizations meet in the community and, in addition, there are a number of cultural and hobby groups which provide opportunities for participation by persons of all ages and interests. These include the following clubs and organizations:

Rotary Club.
Kiwanis.
Lions Club.
Wolves Club.
Optimist Club.
MRS OPTI Club.
Business and Professional Women.
Senior Women's Club.
Junior Women's Club.
Municipal Women's Club.
Junior Chamber of Commerce.
B'nai B'rith.
Jewish Women's League.
Hospital Auxiliary.
Garden Guild.
Town and Garden Club.
Men's Garden Club.
B.P.O.E. No. 1356.
DOES Auxiliary.
Fraternal Order of Eagles.
St. Agatha Social Club.
Mother's Study Club.
Eagles Auxiliary.
Loyal Order of Moose.
Moose Auxiliary.
I.O.O.F. No. 9.
Ladies' Loyal Orange Lodge.
Rebecca Lodge No. 317.
Pythian Sisters.
Ellwood City Saxons.
Polish National Alliance.
Saxon Auxiliary.
Hungarian Club.
Hungarian Women's Club.
Carol 1st Roumanian Aid Society.
Roumanian Auxiliary.
Sons of Italy.
Corna D'Italia.
Ellwood City Area P.T.A. Council.
Eagle Coin Club.
T.O.P.S.E.C. Loosers.
Red Barn Players.
Catholic Daughters of America Court Ellwood No. 901.
E. C. Council No. 61 Sons of Columbus.
Progressive Women's Lodge Sons of Italy.
Workingmen's Social Club.
J. Wilbur Randolph Post No. 157, American Legion.
American Legion Auxiliary.
Veterans of Foreign Wars—Post No. 252.
V.F.W. Auxiliary.
Ellwood City Young Republicans Club.
Sons of Union Veterans Auxiliary.
Disabled American Veterans.
Disabled American Veterans Auxiliary Chapter No. 112.
G.A.R. Ladies.
Knights of Columbus.
Hospital Board of Trustees.
E. C. College Club.
Ellwood City Ministerial Assoc.
E. C. Council of Protestant Churches.
Protective Home Circle.
Order of Rainbow Girls.
Hazeldell W.C.T.U.
Ellwood W.C.T.U.
Croatian Fraternal Union.
Women's Benefit Association.
Ellwood City Volunteer Fire Department.
Fire Department Auxiliary.
Lawrence County Civil Defense.
Ellwood Chapter No. 2 Order of Builders.
Art Club.
Ellwood City Board of Health.
Ellwood City Area Democrats.
Democratic Women.
E. C. Council of Republican Women.
E. C. Area Civic Council.
Ellwood Area Republican Committee.
Ellwood City's Civil Defense Director.

69. Protestant and Roman Catholic churches, a Jewish synagogue, and a Greek Orthodox church serve the Ellwood City area. Altogether, there are more than forty churches representing the various faiths and denominations.

70. The school district's enrollment is 4,300 pupils as follows:

Elementary School (K–6)	2,100
Secondary School (7–12)	2,200

71. The professional staff in the Ellwood City Area School District numbers approximately 210 plus 61 service personnel. The budget for the school district for the 1969–70 term was $3,417,690.

72. The majority of the inhabitants own the homes in which they live. Private interests have under plan and construction 300 homes and apartment units to meet the need for rental properties. Construction of a fifty unit apartment building for the elderly was completed in 1967. Application has already been made with the Federal Government to construct another fifty units for the elderly of the community.

73. Ellwood City has a 100 bed general hospital in the southwest end of the community. There is also a combination maternity and long-term care unit. Plans call for a new $5,000,000 hospital to be built adjacent to the present maternity unit. Existing state clinics and remedial and preventative health organizations are active in the area.

Issue No. 5

74. Issue No. 5 is taken up last, chiefly because of the prodigious amount of data supplied by Jud. The Broadcast Bureau's findings hold that Jud has met the issue satisfactorily. The Hearing Examiner agrees. To condense, even skimpily, these data would mean adding pages and pages to this initial decision. The Hearing Examiner has not only scrutinized the data but has had the opportunity on an open record to hear testimony regarding the same. There is no desire to be peremptory or unfair to the other applicant by not detailing the efforts and results of Jud's handling of this issue, but the Hearing Examiner finds that the issue has been satisfactorily met by an abundance of effort.

75. However, to forestall any accusation of skimpy treatment, this initial decision should mention that, at a formal conference held January 10, 1972 (for other reasons), counsel for Media urged this Hearing Examiner to consider the initial decision of Hon. M. F. French in re the application of Frank M. Cowles, Docket No. 18790, FCC 71D–96; 77950. This Hearing Examiner has carefully examined Hearing Examiner French's initial decision and has concluded that there is nothing inconsistent vis-a-vis Hearing Examiner French's excellent decision and this initial decision.

76. Alluding again to the prodigious volume of Jud's survey data re the "Suburban Issue," and keeping in mind the secretarial burden, alone, of detailing such data, the Hearing Examiner is incorporating the data by reference in this initial decision. Official notice of these data need not be taken because they already are matters of record.

77. At a hearing session held on September 15, 1970, the following stipulation between Media, Inc. and Hubbard Broadcasting, Inc., identified as Hubbard-Media Joint Exhibit No. 1, was read into the record (Tr. Vol. 10, pp. 402–403):

AGREEMENT

"Media, Inc. and Hubbard Broadcasting, Inc., by their attorneys, hereby agree to the following six conditions to be imposed upon Media in reference to its 'critical hours' pattern:

1. That the pattern will be adjusted as near as possible to the theoretical, including control of the RMS of the pattern at not more than 90 mv/m by the insertion, if required, of an appropriate limiting resistor at the common point.

2. That a monitoring point be established on a bearing of 297.5° True to be measured each week.

3. That a Potomac Instruments Type AM–19 phase monitor shall be installed. However, the Precision Monitor Adapter, Type PMA–19, will also be included in the event the Commission includes such a specification in the construction permit.

4. That the phasing and coupling equipment shall include switching provision for non-directional operation.

5. That temperature stabilized transmission lines and sampling lines shall be installed.

6. That the sampling lines installed shall be of equal length."

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78. Pursuant to the above, Hubbard's findings propose that "if the Hearing Examiner recommends a grant of Media, Inc.'s application, the grant should be subject to the above-stated conditions. Accordingly, any grant to Media should read as follows:

'Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Media, Inc., for authority to construct a new standard broadcast station at Youngstown, Ohio, IS GRANTED subject to the following conditions:

1. That the pattern will be adjusted as near as possible to the theoretical, including control of the RMS of the pattern at not more than 90 mv/m by the insertion, if required, of an appropriate limiting resistor at the common point.
2. That a monitoring point be established on a bearing of 297.5° True to be measured each week.
3. That a Potomac Instruments Type AM–19 phase monitor shall be installed. However, the Precision Monitor Adapter, Type PMA–19, will also be included in the event the Commission includes such a specification in the construction permit.
4. That the phasing and coupling equipment shall include switching provision for non-directional operation.
5. That temperature stabilized transmission lines and sampling lines shall be installed.
6. That the sampling lines installed shall be of equal length.'"

ULTIMATE FACTS AND CONCLUSIONS

Technical Issues

1. This proceeding involves the two mutually exclusive applications of Media, Inc. seeking a new Class II standard broadcast station at Youngstown, Ohio on 1500 kHz with 500 watts power daytime and 250 watts during critical hours, using different directional antennas for each mode of operation, and Jud, Inc. seeking a new Class II facility at Ellwood City, Pennsylvania on 1500 kHz with 250 watts power, daytime only, directionalized.

Media, Inc.

2. Youngstown, Ohio, population 139,788, is the county seat of Mahoning County, population 303,424, and is one of the central cities of the Youngstown-Warren Metropolitan Statistical Area, population 536,003, comprised of Mahoning and Trumbull Counties. Three AM, four FM, and three TV stations operate there. Media proposes to serve 624,370 persons in 1,727 square miles within its 0.5 mv/m daytime contour and 515,944 persons in 1,178 square miles in its 0.5 mv/m contour during critical hours. At least six stations serve all of the rural areas and at least five serve all of the urban areas proposed to be served, including Youngstown. The proposed 5.0 mv/m contour would cover 99.97% of the population and 99.01% of the area of Youngstown, daytime, and 99.66% of the population and 99.43% of the area during critical hours. It would, therefore, be in substantial compliance with the requirement of Section 73.188(b)(2) of the Commission's Rules.[2]

3. Four towers arranged in an offset fashion will be used for each mode of directional operation. Twelve steel towers supporting a high

[2] Section 73.188(b)(2) reads as follows in pertinent part:
"(b) The site selected should meet the following conditions . . .
"(2) A minimum field intensity of 5 to 10 mv/m will be obtained over the most distant residential section."

voltage transmission line are situated within 0.2 to 0.6 mile of the proposed transmitter site. The applicant proposes to detune such structures by mounting wire skirts on the towers and connecting them to a reactance network which will be adjusted for minimum radiation. The maximum cost, if found necessary, would be $5,028.00. A letter from the Ohio Edison Company represents a reasonable showing that the necessary cooperation of the Company will be obtained.

4. Theoretical computations show that for the most adverse combination of antenna parameters, tolerances in the order of 0.5% and 0.5° in current ratio and phase, respectively, would be the maximum limit for the daytime mode of operation in order to avoid exceeding the MEOV's. Tolerances for the critical hours operation are less stringent. In any event, the probability of the worst combination occurring in a four element directional antenna system is slight. The applicant proposes to install a Potomac Instruments Type AM–19 phase monitor and, if required by the Commission, will install a precision monitor adapter Type PMA–19. This equipment is sufficient to accommodate the above tolerances. Although the base operating resistances of some of the elements in each mode of operation will be negative, the phase and coupling systems will be designed in the best manner possible, using highest quality components so as to insure stability as well as to permit control of the station operating parameters. Temperature stabilized transmission lines and sampling lines will be installed. Sampling lines will be of equal length. The minimum MEOV on the critical hours pattern of 23.4 mv/m is 26% of the pattern RMS of 90 mv/m and the minimum MEOV on the daytime pattern of 50 mv/m is 39% of the pattern RMS of 128.75 mv/m. Applicant's consulting engineer concluded that the radiation patterns can be adjusted and maintained so as not to exceed the maximum expected operating values specified. It is concluded from all of the foregoing that Media has satisfactorily met the issue relative to adjusting and maintaining its proposed directional antenna systems within the specified limits of radiation. Moreover, with the directional antenna system for operation during critical hours adjusted and maintained so as not to exceed the MEOV's specified by the applicant, it is also concluded that no objectionable interference would be caused to Station KSTP, St. Paul, Minnesota.

Jud, Incorporated

5. Ellwood City, Pennsylvania, population 10,857, is situated partly in Lawrence County, population 107,374, and partly in Beaver County, population 208,418, about 30 miles northwest of Pittsburgh and 20 miles southeast of Youngstown outside of any urbanized area. Ellwood City *has no AM station*, one FM station, and *no TV station*. Jud proposes to serve 155,692 persons in 850 square miles. *At least five stations serve the rural and urban portions therein, including Ellwood City.* The proposed 25 mv/m contour covers all of the central business district and about 90% of the factory areas of Ellwood City. Thus, it may be concluded that the proposal is in substantial compliance with the requirement of Section 73.188(b)(1) of

the Rules.[3] See *Ian S. Lansdown*, 14 RR 488, 491; *Reilly & Spates*, 24 FCC 259, 268.

Common Service Area

6. Youngstown and Ellwod City are some 20 miles apart at the closest limits and the proposed transmitter sites are 25 miles apart. About 30% of Media's primary service area is duplicated by Jud and about 40% of Jud's primary service area is duplicated by Media. The proposed 2.0 mv/m contours do not overlap and *neither applicant serves the community of the other.*

Non-technical Issues

7. In designating a "divorcement of interests issue" against Media, the Commission observed, on the basis of Media's application, that it appeared that John T. Galanses, vice-president and general manager of the applicant, was also presently an announcer-engineer with Stations WHOT and WRED–FM, Campbell, Ohio. The Commission further noted that since Campbell is in the greater Youngstown area, there would be a mutual 1 mv/m overlap between WHOT and Media's proposed station. Concerned with the potential impairment of competition which might ensue if individuals were permitted to maintain cross-interests in two facilities in the same broadcast service serving substantially the same area, the Commission specified an issue inquiring as to whether a grant of Media's application would contravene Commission policy requiring divorcement of interests between stations serving substantially the same area. See FCC 69–1362, released December 17, 1969, Para. 8.

8. On the basis of the Findings set forth *supra*, it is apparent that John T. Galanses has not been affiliated with WHOT since September 1967. Moreover, it is clear that Galanses presently has no media interest in the Youngstown area other than his interest in the instant application. Accordingly, it is concluded that the potential cross-interest problem with respect to Galanses has been removed, and that this issue may be resolved in Media's favor.

9. With respect to the Section 1.65 [4] and Section 1.514 [5] issues designated by the Review Board in this proceeding against Jud, certain material facts are uncontroverted. Jud, Inc. is the 50% owner of National Cable Television Corporation, a Pennsylvania corporation which owns and operated CATV systems. In addition, Jud Sedwick,

[3] Section 73.188(b)(1) reads as follows in pertinent part:
"(b) The site selected should meet the following conditions:
"(1) A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city."

[4] Section 1.65 states in pertinent part:
"Each applicant is responsible for the continuing accuracy and completeness of information furnished in a pending application or in Commission proceedings involving a pending application. Whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, amend or request the amendment of his application so as to furnish such additional or corrected information as may be appropriate. Whenever there has been a substantial change as to any other matter which may be of decisional significance in a Commission proceeding involving the pending application, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown, submit a statement as may be appropriate."

[5] Section 1.514 states in pertinent part:
"(a) Each application shall include all information called for by the particular form on which the application is required to be filed, unless the information called for is inapplicable, in which case this fact shall be indicated."

a 99.6% stockholder of the applicant, is 98% stockholder of Armstrong Utilities, Inc., another Pennsylvania corporation which owns and operates various CATV systems.

10. The record evidence establishes that in its application filed on May 11, 1967, Jud merely reported that National Cable owned and operated a CATV system in Connellsville, Pennsylvania; that Armstrong Utilities owned CATV systems in Butler, Pennsylvania and Orrville, Ohio; and that Armstrong Utilities was in the process of constructing a system in Ellwood City, Pennsylvania. However, by Jud's own admission, Armstrong Utilities also held CATV franchises in the following additional communities at the time of the filing of its application which were *not* reported in its application: Butler Township, Pa.; Wayne Township, Pa.; and Wampum Borough, Pa. Jud also admitted that National Cable held franchises at the time of filing which were not reported in the application in Connellsville Township, South Connellsville, Dunbar, Everson, and Scottdale, Pa. Finally, Jud admitted that since the filing of its application it has failed to amend its application within thirty days to reflect the acquisition of franchises by its two companies in Ellport, Koppel Borough, Perry Township, Zelienople and Evans City, Pa.; Ashland and Rittman, Ohio; and Hamlin, West Hamlin and Ripley, West Virginia.[6]

11. In addition to its failure to report the existence of franchises obtained before and after the filing of its application, Jud also admits that it failed to amend its application to reflect the fact that its construction permit for UHF Station WJUD–TV in West Palm Beach, Florida was dismissed for failure to construct. Finally, the record establishes that Jud failed to notify the Commission until September, 1970 that Jay Sedwick, its secretary, had been president of National Cable since 1966 and treasurer of Armstrong Utilities since December 1969.

12. The record reveals a pretense that Jud's failure to report the existence of the above franchises at the time of filing resulted from Jay Sedwick's misunderstanding of the Commission's requirements. Sedwick claims he believed that only systems in operation or under construction were required to be reported in an application and that, in any event, by naming the largest community in which the system operated (i.e., the community containing the head-end), the Commission's requirements had been satisfied. Insofar as the failure to report franchises obtained after filing the application and the failure to report dismissal of WJUD are concerned, it is urged that Jay Sedwick, Jud's secretary, was unaware that it was necessary to amend the application to reflect such a change. However, no explanation was given regarding the failure to report the offices held by Jay Sedwick in Armstrong Utilities and National Cable.

13. Jud's argument that the disclosure of the existence of the Ellwood City head-end was sufficient to cover the other unidentified communities served from it, has already been rejected by the Board as unconvincing. Moreover, the Board has also correctly emphasized that the Commission must have possession of all the facts before it can deter-

[6] The record also shows that Jud did not report its acquisition in November 1969 of a franchise in the Borough of Dunbar, Pennsylvania until July 21, 1970.

mine whether the public interest will be served by the grant of an application. Similarly, the Board has already found unpersuasive Jud's attempt to excuse its failure to reflect the dismissal of the WJUD–TV construction permit as "inadvertence". See 22 FCC 2d at 877–78.

14. At the same time, the Board has also emphasized that the significance of Jud's Sections 1.65 and 1.514 violations must rest upon "a careful consideration of all the surrounding circumstances, e.g., whether the omission was deliberate, unintentional or inadvertent; the number of similar violations, etc. . . . "See 25 FCC 2d at 627." In this context, it is noted that while violations of both sections of the Rules have admittedly occurred here, there nevertheless is no evidence of any intention by any of the applicant's principals to withhold information from the Commission. Indeed, the facts would indicate that the omissions have been unintentional. And the Bureau would conclude that the violations are not of sufficient severity to warrant denial of Jud's application. The Hearing Examiner disagrees.

15. The Broadcast Bureau contends that the disposition of this proceeding must turn upon the preference which may be made under Section 307(b) of the Communications Act. *Unfortunately* that is true.

16. Both communities have sustained a loss of population over the past decade. Youngstown has suffered a loss of 16.2% of its population, while Ellwood City has suffered a 12.5% decrease. It is apparent that neither community may be considered a "growing community." On the technical evidence in this proceeding, it is the Bureau's view that no choice between these applicants may be made under reception aspects. However, there is a difference between the two applicants with respect to a local outlet. Ellwood City has only an FM broadcast facility, whereas Youngstown already has 3 AM, 4 FM and 3 TV outlets. Thus, despite the fact that neither community has demonstrated continued growth, it is reluctantly but necessarily concluded that a preference would accrue to Jud under Section 307(b) of the Act because it would bring the first truly competitive aural outlet to Ellwood City. It is only with a sense of what may be good for Ellwood City as a community and with nothing remotely approaching admiration for Jud that a decision favoring Jud will be made. Good intention or no, an applicant should not be allowed cavalierly to play the irresponsible hob with the Commission's rules and procedures in a "you can't catch me" abandon. Were the situation in Ellwood City's broadcast facilities different, the Jud application would be denied.

Nevertheless, IT IS ORDERED, That unless an appeal from the Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Jud, Incorporated for a new Class II standard broadcast station operating on 1500 kHz with 250 watts power, daytime only, at Ellwood City, Pennsylvania IS GRANTED and the mutually exclusive application of Media, Inc. for a new standard broadcast station at Youngstown, Ohio IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
CHARLES J. FREDERICK, *Hearing Examiner.*

F.C.C. 73R–200

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PACIFICA FOUNDATION, WASHINGTON, D.C. For Construction Permit	Docket No. 18634 File No. BPED–896

MEMORANDUM OPINION AND ORDER

(Adopted May 29, 1973; Released May 30, 1973)

BY THE REVIEW BOARD: BOARD MEMBER NELSON ABSENT.

1. Before the Review Board for consideration is a petition to enlarge issues, filed February 12, 1973, by the Broadcast Bureau,[1] directed against the application of Pacifica Foundation (Pacifica), in which the petitioner seeks the addition of Section 1.65 and unauthorized transfer of control issues.[2] The factual allegations upon which the Bureau bases its requests are undisputed and can be briefly stated. On at least seven separate occasions, subsequent to designation for hearing on August 20, 1969, Pacifica failed to amend its application to reflect serial changes in its officers and directors. Further, although the composition of Pacifica's governing board of directors has changed by more than 50% since its application was originally filed, the applicant has neither sought nor obtained Commission consent to a transfer of control.

2. A Section 1.65 issue is clearly warranted in light of Pacifica's successive failures to amend its application in order to reflect changes in its officers and directors.[3] Section 1.65 of the Commission's Rules provides that whenever information furnished in a pending application is no longer substantially accurate and complete in all significant respects, an applicant shall, unless good cause is shown, amend or seek to amend its application so as to furnish such additional or corrected information as may be appropriate.[4] Contrary to Pacifica's suggestion, the timely submission of Ownership Reports, although this may bear on intent, does not satisfy the requirements of the section; rather, as the Bureau correctly notes, an applicant is required to keep an application which is "pending" before the Commission substantially complete and accurate. Nor do we agree with Pacifica that the Presiding Judge's

[1] Other related pleadings before the Board for consideration are: (a) opposition, filed February 28, 1973, by Pacifica; and (b) reply, filed March 1, 1973, by the Bureau.

[2] The Board is constrained to point out that the information concerning both requested issues has been available to the Bureau for a considerable length of time, specifically, since June 9, 1970, when exhibits were exchanged in the proceeding. However, in view of the serious nature of the allegations raised by the Bureau, the petition will, nevertheless, be examined on its merits. See *The Edgefield-Saluda Radio Co. (WJES)*, 5 FCC 2d 148, 8 RR 2d 611 (1966).

[3] Form 340 is the application form for non-commercial educational FM facilities; question 11, contained in the section pertaining to legal qualifications, requests various information concerning an applicant's officers, members of governing board and holders of 1% or more ownership interests.

[4] The applicant sought to amend its application on February 1, 1973; by Order, FCC 73–213, released February 15, 1973, the Administrative Law Judge denied the applicant's petition for leave to amend.

Order, FCC 70M-854, released June 17, 1970, which provided that all evidentiary matters should remain fixed and in effect during the pendency of a continuance, served to relieve the applicant of its obligation to attempt to keep its application accurate and complete. Finally, although, as Pacifica argues, the precise significance of the composition of the governing body of a non-commercial educational applicant is unclear,[5] the applicant has not, in our view, established that the changes in composition are of little or no significance in this proceeding. Accordingly, an appropriate issue will be added.

3. While the Review Board agrees with the Bureau that the net effect of the gradual changes in Pacifica's board of directors appears to constitute a change of control, we do not agree, given the circumstances here, that the applicant's failure to file an application for a transfer of control warrants the addition of a Section 310(b) issue.[6] The primary basis for our determination is the fact that uncertainty exists as to the extent to which the requirements of Section 310(b) are applicable to non-commercial educational applicants and licensees.[7] It is unnecessary for our purposes to determine whether or not the filing of an application for transfer of control is, in fact, required; rather, the significant fact is that, based upon past precedent, the necessity for such a filing is unclear. Given this uncertainty, the Board has no reason to doubt Pacifica's assurance that it was unaware that it may have been in violation of the Commission's Rules and Regulations in this regard.[8] In light of these circumstances, the Board is of the view that Pacifica's failure to file is excusable, and does not reflect on its basic qualifications to be a Commission licensee.

4. Accordingly, IT IS ORDERED, That the petition to enlarge issues, filed by the Broadcast Bureau on February 12, 1973, IS GRANTED to the extent indicated below, and IS DENIED in all other respects; and

5. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED by the addition of the following issue:

To determine whether the Pacifica Foundation has complied with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission advised of changes in its officers and directors; and, if not, to determine the effect of such noncompliance on the applicant's qualifications to be a Commission licensee.

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[5] See, *e.g.*, *New York University*, FCC 67-673, 10 RR 2d 215 (1967), in which the Commission held that the standard comparative criteria are virtually meaningless in this type of case.

[6] Section 310(b) of the Communications Act of 1934, as amended, provides in pertinent part, that no broadcast license or rights thereunder shall be transferred, assigned or disposed in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such license to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity shall be served thereby.

[7] Pacifica, in an attached appendix, submits: (1) a list of non-commercial educational licensees which it alleges, according to Ownership Reports on file with the Commission and the Commission's educational television history cards, have undergone one or more changes in a majority of the membership of their governing boards without prior Commission approval; and (2) a list of non-commercial educational licensees in which the identity of the person empowered to appoint the members of the governing boards has changed without prior Commission approval. In response, the Bureau submits three letters indicating that some non-commercial educational applicants have sought Commission approval in this regard in certain instances.

[8] Contrary to the assertions of both parties, *Pacifica Foundation*, FCC 64-43, 1 RR 2d 747 (1964), neither gives notice that a filing would be required of Pacifica, nor relieves it of that obligation. In that case, the Commission held that a change in Pacifica's by-laws constituted a transfer of legal control and granted such an application; the Commission specifically did not address itself to the necessity for filing as a result of change in the composition of the applicant's governing board.

6. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence under the issue added herein SHALL BE on the Broadcast Bureau and the burden of proof SHALL BE on the Pacifica Foundation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

41 F.C.C. 2d

F.C.C. 73-484

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re applications by PENSACOLA CHRISTIAN SCHOOL, INC., PENSACOLA, FLA. For CP's for new FM translator stations at Fort Walton Beach, Fla., and Selma and Montgomery, Ala.	BPFT-65, BPFT-68, and BPFT-70

MAY 9, 1973.

PENSACOLA CHRISTIAN SCHOOL, INC.,
125 St. John Street East,
Pensacola, Fla. 32503.

GENTLEMEN: This refers to your applications for construction permits for new FM radio broadcast translator stations to serve Fort Walton Beach, Florida (BPFT-65), Montgomery, Alabama (BPFT-68), and Selma, Alabama (BPFT-70), by rebroadcasting station WPCS(FM), channel 207 (89.3 MHz), Pensacola, Florida, on output channel 288 (105.5 MHz) in each city.

The Commission found you to be qualified as a noncommercial educational licensee in Pensacola, Florida, by reason of the fact that you operate a school in that community. As a matter of policy, where an applicant is found to be qualified as a noncommercial educational licensee only because it operates a school in the community to which the station is to be licensed, the Commission will not authorize that licensee to construct and operate an FM educational station in another community where it does not operate a school. See *Keswick Foundation, Incorporated*, 26 FCC 2d 1025, November 25, 1970. Each of the above applications proposes a translator in a community beyond the predicted 1 mV/m contour of station WPCS where you do not operate a school and where there are other FM stations authorized. The Commission believes that, because in this situation translators would be essentially the same as "satellite" or regular FM stations, the policy should be equally applicable to translators. Consequently, the Commission is unable to make the statutory finding that grant of your applications, or any of them, would serve the public interest, convenience, and necessity and has decided to withhold action on your applications for thirty (30) days to afford you an opportunity to determine whether you wish to prosecute your applications through the hearing process. Accordingly, you are advised that you must inform the Commission, in writing, within the time specified herein, whether you wish to prosecute your applications through the hearing process. You are

cautioned that your failure to respond within the time specified will result in dismissal of your applications, pursuant to section 1.568(b) of the Commission's rules.

Chairman Burch was absent.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

41 F.C.C. 2d

F.C.C. 73-533

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application by PHOENIX BROADCASTERS CORP., BURBANK, CALIF. BHA ENTERPRISES, INC., APPLE VALLEY, CALIF. DONALD J. INGLETT, LOS ANGELES, CALIF. For Assignment of Licenses of Stations KAVR-AM-FM, KAHI, and KAFI-FM	BAL-7694 and BALH-1739

AIRMAIL

MAY 16, 1973.

PHOENIX BROADCASTERS CORP.,
4404 Riverside Drive,
Burbank, Calif. 91505.

BHA ENTERPRISES, INC.,
Apple Valley Inn, P.O. Box 960,
Apple Valley, Calif. 92307.

DONALD J. INGLETT,
347½ North Benton Way,
Los Angeles, Calif. 90027.

GENTLEMEN: This refers to the application for assignment of license of KAVR-AM-FM, Apply Valley, California from BHA Enterprises, Inc. to Phoenix Broadcasters Corporation (BAL-7694; BALH-1739) and to the application for transfer of control of Auburn Broadcasting Corporation, licensee of KAHI and KAFI (FM), Auburn, California from F. Robert Fenton to Donald J. Inglett (55%) and BHA Enterprises (45%) (BTC-6910). Thus BHA Enterprises is the assignor of KAVR-AM-FM and 45% transferee of KAHI and KAFI(FM). In addition, Mr. Gerald Hicks, a 49% stockholder of BHA Enterprises is also a 4.72% stockholder of Phoenix Broadcasting Corporation, the proposed assignee of KAVR and holds an option to increase his share to 19% of that applicant.

A field investigation has been conducted into the activities of BHA Enterprises, Inc. and Mr. Hicks which has raised serious qualifications questions. Some of the matters developed during this inquiry were:

1. In both the assignor and assignee portions of the KAVR assignment application and in the assignee's portion of the KAFI/KAHI applications questions relating to outstanding judgments and litigation which could affect the assignments were all answered in the negative whereas at the time the applications were filed it appears:

(a) There were at least four creditor judgments against Mr. Hicks totalling at least $44,000 and two against BHA Enterprises totalling $10,000.

(b) As a result of a divorce proceeding there was an Order issued restraining each party, which included Hicks, from selling community property. Mr. Hicks' interest in BHA Enterprises was alleged to be community property in the divorce action.

(c) There was a lawsuit pending wherein Lee B. Hutchinson, a reported 8% stockholder in BHA Enterprises, was seeking to recover these shares from Mr. Hicks.

2. With reference to the outstanding judgments set forth in 1(a) above, neither Mr. Hicks nor BHA Enterprises reflected these in the balance sheet submitted with the above-referenced applications. In addition, the Commission has received information that an asset listed on Mr. Hicks' balance sheet, "Mortgages and Trust Deeds—M. Fromer—$38,845" may be non-existent.

3. As noted above, Mr. Hicks is reported in Commission records to be a 49% stockholder of BHA Enterprises. However, it appears from information developed during the course of the Commission's inquiry that Mr. Hutchinson transferred his 8% interest in BHA to Hicks perhaps as early as 1965. It thus appears that an unauthorized transfer of control of BHA has occurred. Moreover, BHA, in ownership reports and in the subject application, has continued to represent that Hutchinson was the owner of 8% of the stock of that corporation.

In view of the above, it appears that both Mr. Hicks and BHA Enterprises have made material misrepresentations, filed reports and applications containing material omissions, and have actively participated in an unauthorized transfer of control of the licensee of KAVR AM & FM. Since BHA is the licensee of KAVR AM & FM and proposes to hold a 45% interest in the licensee of KAHI and KAFI; and since Mr. Hicks, in addition to his interest in BHA, proposes to hold as much as 19% of the stock of Phoenix Broadcasters, an evidentiary hearing will be required before a public interest determination can be made with respect to either application.

In light of the serious questions raised, processing of the subject applications has been deferred. However, a staff review of the applications indicates that there are deficiencies in Sections II, III, IV, and VI of both applications. Thus no final determination has been made as to whether further issues need to be explored in hearing. Before the processing of these applications is completed, the parties to each of these applications are requested to notify the Commission within 10 days of the date of this letter whether they wish to prosecute these applications through the hearing process.

By Direction of the Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73R-206

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Cease and Desist Order To Be Directed Against VIRGINIA A. PICKENS, 4928 PARKVIEW, KANSAS CITY, KANS. Order To Show Cause Why the License for Radio Station KDX-6052 in the Citizens Radio Service Should Not Be Revoked	Docket No. 19548

APPEARANCES

Nelson Ray Pickens on behalf of Virginia A. Pickens; and *Vergil W. Tacy* and *Mary M. Fitzgerald* on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

DECISION

(Adopted June 1, 1973; Released June 5, 1973)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK, AND KESSLER.

1. The Review Board has before it the Initial Decision of Administrative Law Judge Lenore Ehrig in the above-captioned proceeding, revoking the license of Virginia A. Pickens to operate a station in the Citizens Radio Service and ordering her to cease and desist from violating the Commission's Rules, FCC 73D-4, released February 6, 1973. The Board also has before it a letter addressed to the Presiding Judge dated February 26, 1973, and a document entitled "Notice of Filing for a New Trial or Dropping All Charges", both signed "Radio Station KDX 6052, Blondie & Dagwood, the Long Distance Operator"; [1] and a reply, filed by the Chief of the Safety and Special Radio Services Bureau on March 19, 1973. Neither party has requested oral argument on the matter and in our view no useful purpose would be served thereby.

2. The Initial Decision fully and fairly sets forth the facts of record and those facts amply warrant issuance of the Order to cease and desist and the revocation of Virginia A. Picken's license to operate a station in the Citizens Radio Service. The letter and attached document from "Blondie and Dagwood" does not challenge any of the underlying facts. Moreover the Review Board finds no basis in the record of the proceeding for the assertions that the licensee's constitutional rights were violated or that she did not receive a full and fair hearing.

[1] Blondie is a pseudonym used by Virginia A. Pickens in her radio activity. Even though the letter and document do not comply with the Commission's Rules, they will be treated as exceptions to the Initial Decision.

The Review Board will therefore adopt the Initial Decision of the Administrative Law Judge.

3. Accordingly, Virginia A. Pickens is Ordered to Cease and Desist from further violations of section 301 of the Communications Act of 1934, as amended, and of the Commission's Rules; and

4. IT IS FURTHER ORDERED, That the license of Virginia A. Pickens, for Citizens Radio Station KDX 6052 IS REVOKED, effective July 16, 1973; and that a copy of this Order of Revocation SHALL BE served by Certified Mail, Return Receipt Requested, upon Virginia A. Pickens at 1840 North 28th Street, Kansas City, Kansas, 66104; and

5. IT IS FURTHER ORDERED, That operation of Station KDX-6052 SHALL BE TERMINATED upon the effective date of the license revocation specified above, and that, immediately upon such effective date of such license revocation, the licensee shall forward the radio station license to the Commission.

FEDERAL COMMUNICATIONS COMMISSION,
DEE W. PINCOCK, Member, Review Board.

NOTE.—Operation of the radio station specified above after the effective date of license revocation as ordered herein will be in violation of Section 301 of the Communications Act of 1934, as amended, and will subject any person operating such station to the penal sanctions specified in Section 501 of the Communications Act. Within thirty days of the release date of this Order of Revocation, a petition for reconsideration thereof by the Review Board may be filed pursuant to the provisions of Section 1.106 of the Commission's Rules, 47 C.F.R. 1.106, or an application for review thereof by the Commission may be filed pursuant to the provisions of Section 1.115 of the Commission's Rules, 47 C.F.R. 1.115.

F.C.C. 73D-4

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Cease and Desist Order To Be Directed Against VIRGINIA A. PICKENS, 4928 PARKVIEW, KANSAS CITY, KANS. Order To Show Cause Why the License for Radio Station KDX-6052 in the Citizens Radio Service Should Not Be Revoked	Docket No. 19548

APPEARANCES

Nelson Ray Pickens on behalf of Virginia A. Pickens; and *Vergil W. Tacy* on behalf of the Chief, Safety and Special Radio Services Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE LENORE G. EHRIG

(Issued January 31, 1973; Released February 6, 1973)

PRELIMINARY STATEMENT

1. By Order released June 7, 1972, the Commission directed Virginia A. Pickens to show cause why the license for radio station KDX-6052 in the Citizens Radio Service should not be revoked. The Commission also directed respondent to show cause why she should not be ordered to cease and desist from further violations of Section 301 of the Communications Act of 1934, as amended, and of certain of the Commission's Rules. In particular, it was alleged that on January 25, 1972, the respondent's Citizens radio station was in wilful violation of Sections 95.95(c) (failure to identify properly), 95.41(d)(2) (interstation communication on frequencies reserved for intrastation communications), 95.43 (output power in excess of four watts), 95.83(b) (communications over a distance of more than 150 miles), 95.41(d) (use of unauthorized frequencies) of the Commission's Rules; and in violation of Sections 95.83(a)(1) (hobby or diversion) and 95.83(a)(13) (communications relating to technical performance, capabilities, or testing of radio equipment) of the Commission's Rules. The Show Cause Order also alleged that respondent's radio station was operated on January 25, 1972, in wilful violation of Sections 95.37(c)(2) (use of overheight antenna), and 95.35(b) (failure to notify the Commission of two changes in mailing address). However, on the basis of evidence adduced at the hearing, counsel for the Safety and Special Radio Services Bureau determined not to pursue the latter two allegations.

2. Additionally, the Order alleged that the respondent had been notified of these violations by an Official Notice of Violation mailed

February 3, 1972, and by a follow-up letter, but that no response had been received, resulting in a violation of Section 1.89 of the Commission's Rules. Respondent's previous history included similar violations occurring on May 12, 1971. For these a forfeiture of $200 was assessed. At respondent's request, however, the forfeiture was reduced to $50, which amount respondent paid. The Show Cause Order further stated that respondent has manifested an intent to ignore the Commission's correspondence, Rules and procedure; that her conduct was contrary to the public interest, convenience and necessity standards of Sections 301 and 307(a) of the Communications Act of 1934, as amended; that the Commission would be warranted in refusing to grant an application filed by the respondent for a Citizens radio station license if the original application were now before it; and that, in view of respondent's past conduct and manifest intention, it was clear she would continue to operate her radio station in violation of Section 301 of the Communications Act of 1934, as amended, even if her license were revoked.

3. A prehearing conference and hearing were held in Kansas City, Kansas, on November 6, 1972. Respondent and her husband appeared and presented evidence. The record was closed the same day. On December 20, 1972, the Safety and Special Radio Services Bureau filed Proposed Findings of Fact and Conclusions. Respondent neither filed Proposed Findings, nor availed herself of the opportunity to submit Reply Findings even though, at the Presiding Judge's direction, the transcript in this proceeding had been sent to the FCC Field Office for respondent's inspection. This procedure had been agreed upon at the close of the hearing for respondent's benefit.[1]

FINDINGS OF FACT

4. Robert Atkeisson, Dwain Skelton, and Eric Hinrichs are electronic engineers employed by the Federal Communications Commission to investigate violations of the Commission's Rules. They are assigned to the Commission's Kansas City, Missouri, field office. Mr. Atkeisson and Mr. Skelton have been so employed for fourteen years and one and one-half years, respectively. In addition to his experience with the Commission, Mr. Skelton worked in private industry for five years as an electronics technician and for two years as an electrical design engineer. He holds a Bachelor of Science degree in electrical engineering. Mr. Hinrichs has been employed by the Commission for eighteen months.

5. Mr. Atkeisson, assistant engineer in charge of the Kansas City office, first met Virginia Pickens in August 1971, at an interview concerning a forfeiture which had been imposed on her for operating her station in violation of the Rules. Respondent at that time admitted that she and her husband were violating the Rules, but indicated that they would both comply in the future. Respondent paid $50 in settlement of the forfeiture and the matter was closed.

[1] On January 22, 1973, the Commission received from "Radio Station KDX 6052 Blondie & Dagwood The Long Distant Operator" a document entitled, "Notice of Filing for a New Trial or Dropping All Charges." This unsigned, improperly submitted, and inappropriate document is replete with vituperative matter. Despite the foregoing, its contents have been considered and have been found not to be such as to affect the decision in this case.

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6. Subsequently, Mr. Atkeisson received complaints of television interference resulting from respondent's transmissions. Consequently, respondent's station was monitored on January 25, 1972, starting at 9:50 a.m. on Channel 19 in the Kansas City office. Present were engineers Atkeisson, Skelton and Hinrichs. Mr. Skelton made a tape recording of the monitored transmissions and subsequently had a transcription prepared under his direction and supervision. His procedure consisted of reviewing the tape, transcribing it in longhand, and having his transcription typed by a secretary. He then reviewed the transcription, compared it with his longhand notes, and found it to be a correct copy of the tape evidencing the monitoring. During this monitoring, the engineers recognized the person transmitting and immediately drove to the vicinity of the station.

7. The car used by the engineers was equipped with direction-finding (DF) equipment suited for investigative purposes. This equipment consisted of a rotatable loop antenna connected to a receiver which had an indicator. By rotating the antenna, the direction of the signal can be perceived from the indicator. However, the engineers did not find it necessary to use the direction-finding technique to reach the immediate vicinity of respondent's home. As a result of previous television interference complaints, they had established the location of her residence. Thus, when the transmissions were heard and the voice recognized, they were able to drive there without the use of the direction-finding equipment.

8. The engineers parked in an alley just northeast of respondent's home and continued to monitor from the car. The time was 11:00 a.m. From their position, they could observe respondent's antenna and part of the residence. During the monitoring, they observed the antenna rotating approximately 270 degrees, establishing that the station was transmitting. At the same time, they recorded the signal strength coming from the station. This was done by adjusting the receiver and reading the indication on the "S" meter, which is part of the receiver. An attenuator, which reduces signals coming into the receiver, was also used. In this case, the signal received was of such a magnitude that it could not be recorded by the "S" meter. By inserting an attenuator in a circuit of the receiver, the meter was able to register the signal. By this process, signal strength was measured at seventy units on the "S" meter with 30 decibels of attenuation. If the transmitting station had been operating at four watts or less, however, there would have been no reading on the "S" meter. The signal emanating from respondent's residence was computed to be in excess of fifty watts.

9. After completing the monitoring on respondent's station, the engineers monitored another station, drove to the residence of that licensee, and performed an inspection. At approximately 12 o'clock noon they returned to respondent's residence in order to inspect her radio station.

10. Under usual circumstances, only two engineers conduct an inspection. In light of past violations, however, all three of the engineers participated in the inspection of respondent's station. Mr. Hinrichs knocked on the door. When Mrs. Pickens answered, Mr. Atkeisson recognized her as the woman he had previously met. The

engineers identified themselves by the standard procedure. They showed their identification cards and photographs to respondent and requested permission to inspect her station. At her invitation they entered the house. They waited for one minute while she went into another room and then they were admitted to the room containing the station. Mrs. Pickens remained in the room during the entire inspection.

11. The engineers followed their routine procedure. First, they requested to see respondent's station license. They then determined that her equipment consisted of a normal five watt transmitter plus a linear amplifier. The transmitter was turned on and tuned to Channel 1. The linear amplifier was switched off, but was warm to the touch. Messrs. Hinrichs and Skelton measured the frequencies of the different channels, including the frequencies 27.30 MHz, 27.31 MHz, 27.32 MHz, and 27.34 MHz, all of which are unauthorized frequencies for Class D Citizens radio stations (Section 95.41(d)). Respondent said she had no knowledge of these frequencies existing in her equipment.

12. After the frequencies on respondent's transmitter were measured, Mr. Atkeisson proceeded to make power tests. He parked the investigative car in the same place it had been when the original monitoring was done. By use of the "S" meter, he then measured the power of the transmitter with and without the linear amplifier connected to it. He came to the conclusion that respondent's transmitter was used with a linear amplifier during the previous monitorings at 9:50 and 11:00 a.m. The signal strength of the transmitter alone measured only twenty units. With an amplifier, it measured 70 units with 30 decibels of attenuation.

13. At no time during the inspection were the engineers ever requested to stop or to leave the respondent's residence. The entire inspection was cordial as far as all parties were concerned. Mr. Atkeisson observed a station log and asked Mrs. Pickens about it. She stated that it did not belong to her. However, he determined from the names appearing on the front of the log, "Nelson and Virginia Pickens," that it was a part of the station's records. Mr. Atkeisson asked if he could take the log and give Mrs. Pickens a receipt for it. Mrs. Pickens did not object to this request. At the hearing, Mrs. Pickens testified that she did keep a log of the various persons whom she had contacted throughout the United States, and that the Commission's engineers had taken it with them on January 25, 1972, after giving her a receipt. She stated that Exhibit 13, which is a copy of the front cover of a log entitled "Minilog," resembled this log book and that her call number was the same as the one on it. Exhibit 14 was identified as extractions from the log taken from Mrs. Pickens on January 25, 1972. At the hearing, Mrs. Pickens admitted that two of the entries contained in Exhibit 14 appeared to be in her own handwriting.

14. Respondent received an official Notice of Violation mailed February 3, 1972, alleging irregularities occurring January 25, 1972. She did not answer the Official Notice, nor did she answer a warning letter dated February 18, 1972. As indicated above, an Order to Show Cause was released on June 7, 1972, looking toward revocation and the issuance of a cease and desist order. A letter was sent in response to

this Order, dated July 5, 1972. It was signed "Blondie and Dagwood, The Long Distant Operator," and was written by respondent's husband, Nelson Ray Pickens.

15. In this letter, Mr. Pickens claimed that the F.C.C. had come into their home, turned on the radio and amplifier without their permission, and had taken a log book without permission from either of them. At the hearing, however, Mrs. Pickens testified that the engineers had first identified themselves and asked if they could enter to check her radio station and run a frequency test. She replied that she "could care less." (Tr. 105.) Mr. Thomas Junior Cordray, present at respondent's home on the day of the inspection, also testified at the hearing. He claimed that the engineers first entered, after which they told Mrs. Pickens they were from the Commission. However, on cross-examination, Mr. Cordray admitted that he did not see the engineers until after they were in the house and were walking toward the room containing the radio equipment. Moreover, as stated above, the engineers testified that after they had identified themselves and requested permission to inspect Mrs. Pickens' station, she had asked them to come in. They were at no time requested to stop or to leave. Mrs. Pickens had no objection whatever to their taking the station log.

FAILURE TO IDENTIFY PROPERLY

16. Subsequent to the payment of the $50 forfeiture for violations occurring on May 12, 1971, respondent continued to use the pseudonym "Blondie" while transmitting from her radio station. She also answered to the name Blondie whenever she was addressed as such over the air. Respondent's car, containing a mobile unit, had a sign on it reading, "Channel 19 of Blondie and Dagwood, the Long Distance Operators." During the conversations at 9:50 and 11:00 a.m. on January 25, 1972, respondent and the other operators identified her station several times by her pseudonym. The other stations were identified as "Coat Hanger" and "Bull Dog." Respondent admitted she did not use her call sign during these conversations. In fact, at no time were any Commission assigned call signs used in these conversations. In the second conversation Mrs. Pickens signed off: "3s and I'm gone." Respondent stated that if her license were still in effect after the hearing, she would continue to use her pseudonym; and even if her license were revoked, she would continue to transmit without her call sign. Section 95.95(c) of the Commission's Rules requires that a station identify itself by call sign and identify the stations communicated with by call sign.

INTERSTATION COMMUNICATIONS ON AN INTRASTATION FREQUENCY

17. On January 25, 1972, respondent used her radio station to transmit communications to other stations on frequency 27.185 MHz (Channel 19). Mr. Atkeisson testified that he monitored the respondent's communications on Channel 19. Mr. Skelton confirmed that he also heard this monitoring. This frequency is not one of those permitted by Section 95.41(d)(2) of the Commission's Rules for interstation communications. Mrs. Pickens testified that she had spoken before to

"Coat Hanger," the other party to the conversation, although she could not remember the date. When shown the log book, she identified two of the entries as her own handwriting. These two items are under the date of January 25, 1972. One of them lists as the station called, "Coat Hanger," then the name "Blondie," then "San Diego Harbor" and "Channel 19." After thus having her memory refreshed, respondent recalled that she had had a conversation with "Coat Hanger" on that date and on that channel. Moreover, she admitted that she normally transmitted on Channel 19.

OUTPUT POWER IN EXCESS OF FOUR WATTS

18. As stated above, the engineers made tests from their position in the alley northeast of respondent's home. They recorded the signal strength coming from respondent's station as 70 units with 30 decibels of attenuation. Based on their expertise, they determined that power was being used in excess of the legal limit of four watts as provided in Section 95.43 of the Commission's Rules. In fact, the transmitter was found to be putting out 50 watts. The engineers again made tests during their inspection of respondent's station. When they tested the transmitter alone, it registered only 20 units with no attenuation. When they measured it with a linear amplifier, it registered 70 units with 30 decibels of attenuation, the same reading taken at the time the transmitting station was monitored.

19. The transmitter at respondent's station was of the normal type with a five watt input limit. To have made transmissions in excess of 50 watts, respondent would have needed a linear amplifier. Moreover, the monitoring and log record indicated the station contacted was in California. A transmitter alone could not have reached the distance from Kansas City to California without either "skip" or an amplifier. Mrs. Pickens had a linear amplifier at her station at the time of the inspection. The linear was warm to the touch, indicating that, although it was not on then, it had been in use very recently. Mrs. Pickens admitted that she does in fact transmit with her linear. However, she stated that the radio and linear were not on at the time of the inspection because she had turned them off earlier.

COMMUNICATIONS OVER A DISTANCE OF 150 MILES

20. During the monitoring conducted on January 25, 1972, respondent was heard communicating with a station identified as "Coat Hanger" purporting to be located in California. During this conversation, respondent stated:

> "10 roger what part are you in out there—Hetrodyne—What part are you in out there in California." (Bur. Ex. 11. p. 3)

"Coat Hanger" answered:

> "We were sittin here in this L.A. harbor. Sittin here in this Los Angeles harbor 10–4." (Bur. Ex. 11, p. 3)

Respondent testified that she uses an amplifier to talk "skip." She also stated she has talked as far as California without a linear amplifier. She confirmed that she carried on the above-described conversation with "Coat Hanger" in California. The distance between these two

stations is definitely over 150 miles, which, as provided by Section 95.83(b), is the greatest distance a Citizens band licensee is allowed to transmit. She testified that she is expressing peace, friendship, fellowship and brotherly love by talking "skip" across the United States.

USE OF AN UNAUTHORIZED FREQUENCY

21. The evidence in the record does not support a finding that respondent violated Section 95.41(d) of the Commission's Rules. During the inspection, however, the engineers determined that respondent's transmitter contained frequencies 27.30, 27.31, 27.32 and 27.34 MHz. According to Section 95.41(d) of the Commission's Rules, these frequencies are not allocated for use by Class D radio stations.

COMMUNICATIONS RELATING TO TECHNICAL PERFORMANCE, CAPABILITIES OR TESTING OF RADIO EQUIPMENT

22. Section 95.83(a)(13) of the Commission's Rules prohibits communications relating to the performance, capabilities or testing of radio equipment. Respondent on January 25, 1972, made two such references:

"Sound like a good thing there. Heavens, I wish my base and my mobile was half as loud as that base you have there on that mobile. Yeah but your awful loud there this mornin critter." (Bur. Ex. 11, p. 3)

"Hetrodyne—boy you sure are loud." (Bur. Ex. 11, p. 3)

HOBBY COMMUNICATIONS

23. Section 95.83(a)(1) of the Commission's Rules prohibits the use of a Citizens radio station to engage in radiocommunications as a hobby or diversion, i.e., as an activity in and of itself. Respondent's communications on January 25, 1972, including those which related to signal strength and capabilities of radio equipment, are hobby-type transmissions. Another communication by respondent which evidences the use of her radio station as a diversion is the following statement:

". . . I'll be in there the biggest share of the day there. So if you get a chance talk to me a little bit later there. By golly give this old 'Blondie' a shout and she will come back to you. How about it?" (Bur. Ex. 11, p. 3)

CONTINUING NATURE OF RESPONDENT'S ACTIONS

24. As stated above, respondent ignored the Commission's Official Notice of Violation mailed February 3, 1972, and a Warning Letter dated February 18, 1972, thus violating Section 1.89 of the Rules. In reply to the Commission's Order to Show Cause, respondent and her husband requested a hearing. Mrs. Pickens also responded with a "United CB'ers of America" letter dated July 12, 1972. In this letter Mrs. Pickens advised the Commission that all letters, citations, and forfeitures from the Commission will be ignored. Mrs. Pickens is the Kansas state representative for the United CB'ers of America. As a member of that organization, she does not respond to correspondence from field offices, as required by law. Only after a notice is received from Washington, D.C., does a member respond, and then with the "United CB'ers of America" letter. In other words, membership in the United CB'ers means dealing only with Washington. All members

are instructed to file this letter and to continue to violate the Commission's Rules. This behavior is aimed at forcing the Commission to allocate the Citizens radio service to hobby use and at forcing it to approve a petition filed by the organization calling for, among other things, the rescission of all fines and citations for the past five years.

25. Respondent testified that she will continue to transmit, not only in violation of the Rules, but will also engage in unlicensed operation if her license is revoked. If she is allowed to keep her license, she will continue to use the pseudonym "Blondie" and to talk "skip." Even if she loses her license, she intends to stay on the air, since she has "paid quite an expensive amount" for her equipment (Tr. 25). Respondent also agrees with the "Ten Commandments" of this organization. These include avowals to use Citizens radio for hobby purposes, as respondent alleged it was intended; to ignore all letters from field offices; and to refuse entry to a Commission agent unless accompanied by a U.S. Marshal with a search warrant. Finally, respondent testified that on January 25, 1972, she was not operating her station in full accordance with the Commission's Rules and Regulations.

CONCLUSIONS

1. The evidence adduced at the hearing clearly establishes that respondent operated her Citizens radio station on January 25, 1972, in wilful violation of Sections 95.95(c), 95.41(d)(2), 95.43, and 95.83(b); and in violation of Sections 95.83(a)(1) and 95.83(a)(13); and in repeated violation of Section 1.89 of the Commission's Rules. The evidence does not support a finding that respondent violated Section 95.41(d) of the Rules.

2. Through previous television interference complaints and a personal interview with respondent, the engineers had become familiar with her voice and home vicinity. They recognized her voice over the air on January 25, 1972, and immediately drove to her residence. There, they observed respondent's antenna in rotation, indicating that the station was transmitting. By use of electronic testing equipment, they concluded that not only was a transmitter in use, but a linear amplifier as well. Most important, respondent admitted that she talked on January 25, 1972, with "Coat Hanger." Therefore, the conclusion is warranted that it was respondent's radio station which the engineers monitored.

3. Not once during the monitored conversation did respondent use her call sign to begin or end the transmissions. Such behavior on the part of respondent evidences a blatant disregard of the Commission's Rules, as does respondent's use of Channel 19 to transmit interstation communications. The Citizens Radio Service was established as a means to transmit communications in connection with either personal or business activities, primarily between units of the same station. *Citizens Radio Service*, 19 RR 1548 (1960). Consequently, respondent's use of an intrastation frequency for interstation communications decidedly interfered with the purpose for which the Citizens Radio Service was established. The Citizens radio concept can only survive if the rules of operation are strictly observed by all licensees of the service. The alternative is chaos. *One Stop Service*, 32 F.C.C. 2d 981, 983 (1971).

4. Respondent's transmission over a distance of 150 miles and her operation of a linear amplifier further show her lack of concern with the needs and rights of other licensees. Such operation impedes the use of Citizens band frequencies by those who use it for the purposes for which it was intended.

5. Respondent's culpability is further demonstrated by the content of her transmissions. They consisted solely of hobby talk and talk relating to technical performance of equipment in violation of Sections 95.83(a)(1) and (13) of the Commission's Rules.

6. Respondent's violation of these Rules alone justifies revocation. The evidence at the hearing was clear and convincing. Respondent did not controvert it or offer any evidence of her own to the contrary. However, the Commission must also consider her disregard of rules regarding correspondence and her blatant statements of intent to operate despite revocation. Respondent failed to reply to the Official Notice of Violation and to the subsequent warning. After an Order to Show Cause was issued, she replied by a letter written by her husband and by a letter written by the United CB'ers of America. At the hearing, she testified that, as a member of this organization, she will ignore all correspondence from field offices and only reply to Washington. She stated that she will continue to transmit even if her license is revoked. She further stated that these transmissions will be conducted in violation of the same Rules for which she was cited, i.e., talking "skip," use of pseudonym, use of linear amplifier. This type of conduct can be stopped only by a Cease and Desist Order.

7. There can be no question that Citizens radio station KDX–6052 was used on January 25, 1972, to transmit communications in violation of the Commission's Rules and Regulations as alleged in the Order to Show Cause. The Commission must, therefore, revoke the license of Citizens radio station KDX–6052. Since respondent has stated her intent to disregard all Commission Rules in the future even if her license is revoked, it is essential that she be ordered to cease and desist from such prohibited behavior.

Accordingly, pursuant to Section 312 of the Communications Act of 1934, as amended, and Rule 1.91, IT IS ORDERED that unless an appeal from this Initial Decision is taken to the Commission by a party or the Commission reviews this Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, Virginia A. Pickens IS ORDERED TO Cease and Desist forthwith from further violations of Section 301 of the Communications Act of 1934, as amended, and further violations of the Commission's Rules as described above.

IT IS FURTHER ORDERED that the license of Virginia A. Pickens, Kansas City, Kansas, for Citizens Radio Service Station KDX–6052 IS REVOKED.

Unless action is taken under Rule 1.276, the effective date of this revocation order is fifty days from the public release of the full text of this Initial Decision. The Secretary is directed to serve a copy of this Initial Decision on respondent Virginia A. Pickens at the address stated in the caption, and also at 1840 North 28th Street, Kansas City, Kansas, 66104.

FEDERAL COMMUNICATIONS COMMISSION,
LENORE G. EHRIG, *Administrative Law Judge.*

F.C.C. 73-523

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
WHAS, INC., LOUISVILLE, KY.
For Waiver of "Off Network" Provisions of the Prime Time Access Rule (Section 73.658(k)(3))

MAY 16, 1973.

MR. E. F. SHADROURNE,
Executive Vice President,
WHAS, Inc. (WHAS-TV),
P.O. Box 1084,
Louisville, Ky. 40201.

DEAR MR. SHADBOURNE: This is in reply to your letter of May 2, 1973, transmitted by counsel on May 3, concerning the presentation on WHAS-TV of the "National Geographic" program series. Your letter requests waiver of the "off-network" provisions of the prime time access rule (Section 73.658(k)(3)) to permit carriage of this program during prime time, in addition to the permissible three hours of network and off-network programs the same evening. You also state that WHAS-TV has been carrying this material, on the basis mentioned, from January 13 through May 1, 1973, without any prior Commission waiver or authority, in the belief that under waivers issued by the Commission for this material, this station was permitted to present it also. We assume that your reference to Commission waiver actions is to our decision released October 31, 1972 (*Storer Broadcasting Company, et al.*, FCC 72-956, 37 FCC 2d 933, 24 R.R. 2d 868), which granted the requests of three licensees for waiver of the rule with respect to the presentation of this program on five stations.

As far as the immediate future is concerned, it appears appropriate to grant the waiver, just as it was to the five stations covered in the decision referred to. However, with the general rule-making proceeding concerning the "prime time access rule" pending and a decision therein expected shortly, it is not appropriate to grant this waiver for a period extending much beyond the end of the present broadcast year, or through September 30, 1973. This is the period for which waiver was granted in the decision mentioned, as well as in other similar actions taken by the Commission staff since.

The presentation of this program on a basis contravening the rule, without any waiver or authority, is a different matter. It does not appear to us that either the text of the decision released October 31, 1972, or that of the "public notice" thereof issued October 27, 1972 (Mimeo No. 91367), could reasonably give rise to a belief on the part of other licensees that waiver for them was granted or was automatic. These documents mentioned specifically that waiver was granted to

certain stations, those owned by the three licensees whose requests were considered. While there was discussion of general considerations relating to the "National Geographic" material and the rule, there was no language indicating that waiver was being granted generally or to other parties. At the least, inquiry by the licensee or its counsel was indicated to see what the Commission's approach would be. There was no general waiver, nor was one intended.

Accordingly, we must conclude that there was here a violation of the Commission Rules, without any really significant excuse. Such conduct is a serious matter, since the Commission must, and does, expect its licensees to observe its rules.

In view of the foregoing, waiver IS GRANTED to WHAS, Inc., for the period ending September 30, 1973, to present material in the "National Geographic" program series during prime time, without counting toward the three hours of permissible network and off-network material each evening under Section 73.658(1) and (3). You are admonished that the presentation of this material without previous authority has constituted a substantial violation of the Commission's Rules; and in the future we shall expect strict compliance with this and other Commission regulations.

Commissioners Robert E. Lee and H. Rex Lee concurred in the result and Commissioner Johnson dissented.

By Direction of the Commission.
Ben F. Waple, *Secretary.*

F.C.C. 73–522

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Request by
BROADCAST-PLAZA, INC., HARTFORD, CONN.
For Waiver of "Off-Network" Provisions of the Prime Time Access Rule (Section 73.658(k)(3))

MAY 16, 1973.

BROADCAST-PLAZA, INC.,
(WTIC–TV) Broadcast House,
3 Constitution Plaza,
Hartford, Conn. 06115.

GENTLEMEN: This refers to: (1) your "Request for Waiver" filed April 25, 1973, asking waiver of the "off-network" provisions of the prime time access rule (Section 73.658(k)(3)), to permit WTIC–TV to present the "National Geographic" program series, plus one additional similar program, during prime time without counting toward the permissible three hours of network and off-network material each evening; and (2) the fact, mentioned in your request, that you have been presenting this material on this basis since January 1973. You assert that this was in mistaken reliance on the nature of a Commission action released October 31, 1972, granting waiver for the "National Geographic" series to five stations listed in the Memorandum Opinion and Order in which that action was taken (*Storer Broadcasting Company et al*, FCC 72–956, 37 FCC 2d 933, 24 R.R. 2d 868), which you assumed constituted a waiver for presentation of this program, on the basis mentioned, by any station subject to the rule.

As far as the immediate future is concerned, it appears appropriate to grant the waiver, just as it was to the five stations covered in the decision referred to. However, with the general rule-making proceeding concerning the "prime time access rule" pending, and a decision therein expected shortly, it is not appropriate to grant this waiver for a period extending much beyond the end of the present broadcast year, or through September 30, 1973. This is the period for which waiver was granted in the decision mentioned, as well as in other similar actions taken by the Commission staff since.

The presentation of this program on a basis contravening the rule, without any waiver or authority, is a different matter. It does not appear to us that either the text of the decision released October 31, 1972, or that of the "public notice" thereof issued October 27, 1972 (Mimeo No. 91367), could reasonably give rise to a belief on the part of other licensees that waiver for them was granted or was automatic. These documents mentioned specifically that waiver was granted to certain stations, those owned by the three licensees whose requests

were considered. While there was discussion of general considerations relating to the "National Geographic" material and the rule, there was no language indicating that waiver was being granted generally or to other parties. At the least, inquiry by the licensee or its counsel was indicated to see what the Commission's approach would be. There was no general waiver, nor was one intended.

Accordingly, we must conclude that there was here a violation of the Commission Rules, without any really significant excuse. Such conduct is a serious matter, since the Commission must, and does, expect its licensees to observe its rules.

Another consideration, adding to the gravity of the matter, is that the material presented included one program, not part of the "National Geographic" series at all, even though it is distributed by the same supplier and possibly may have been part of the same "package". This is the "Natural History of the World: The Time of Man" program, produced by the New York Museum of Natural History, which WTIC–TV presented in February. Certainly, there was no basis for believing that a Commission decision contemplated a general waiver for a program not even mentioned in it. The waiver granted herein for the remainder of the present broadcast year will apply to this program also; but it cannot seriously be urged that the licensee reasonably believed it to be encompassed by our October decision concerning the "National Geographic" series.

In view of the foregoing, waiver IS GRANTED to Broadcast-Plaza, Inc., for the period ending September 30, 1973, to present material in the "National Geographic" program series, and the one program "Natural History of the World: The Time of Man", during prime time, without counting toward the three hours of permissible network and off-network material each evening under Section 73.658 (1) and (3). You are admonished that the presentation of this material without previous authority has constituted a substantial violation of the Commission Rules; and in the future we shall expect strict compliance with this and other Commission regulations.

Commissioners Robert E. Lee and H. Rex Lee concurred in the result; Commissioner Johnson dissented.

By Direction of The Commission,
Ben F. Waple, *Secretary.*

F.C.C. 73D–14

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of Revocation of the License of SHEDD-AGARD BROADCASTING, INC. (KLSU), WHITE CASTLE, LA.	Docket No. 19514

APPEARANCES

Patrick W. Pendley (Freeman & Pendley) on behalf of Shedd-Agard Broadcasting, Inc.; *James N. Lee* (Durham & Lee) on behalf of Big League Broadcasting Co., Inc.; and *Charles W. Kelley* and *Henry L. Baumann* on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE
FOREST L. MCCLENNING

(Issued March 21, 1973; Effective May 15, 1973, pursuant to Section 1.276 of the Commission's Rules)

PRELIMINARY STATEMENT

1. By Order to Show Cause and Notice of Apparent Liability released May 31, 1972 the Commission, pursuant to Section 312(a)(2) and (4) of the Communications Act of 1934, as amended, instituted a show cause proceeding directing Shedd-Agard Broadcasting, Inc. (hereinafter Shedd-Agard) to show cause why an order revoking its license for Station KLSU White Castle, Louisiana should not be issued and if not, whether an order of forfeiture pursuant to Section 503(b) of the said Act in the amount of $10,000 or some lesser amount should issue. The order was issued on the basis of information raising the following questions:

(a) Whether the license for Station KLSU was transferred, assigned or disposed of, by transfer of control of the licensee corporation or otherwise, without a finding by the Commission that the public interest, convenience and necessity would be served thereby, in violation of Section 310(b) of the Communications Act of 1934, as amended;

(b) Whether the licensee, at all times, has exercised control or supervision over the operation of Station KLSU in a manner consistent with the responsibilities of a licensee;

(c) Whether the licensee has filed appropriate contracts as required by Section 1.613 of the Commission's Rules;

(d) Whether the licensee has filed updated ownership reports (FCC Form 323) with the Commission, as required by Section 1.615 of the Commission's Rules;

(e) Whether the licensee has violated the Commission's Rules, as alleged in the Official Notices of Violation issued on December 29, 1970 and on March 14, 1972, and, if so, the nature and the extent of those violations and, in light of the evidence adduced pursuant to that determination, whether the applicant has

exercised that degree of responsibility required of a licensee of a broadcast station; and

(f) Whether, in light of the evidence adduced under the preceding questions, the licensee prossesses the requisite qualifications to remain a licensee of the Commission.

2. As directed in the Order to Show Cause the Chief of the Broadcast Bureau June 15, 1972 served upon Shedd-Agard a bill of particulars regarding the matters referred to in the above specified questions. By order released July 14, 1972 Big League Broadcasting Company, Inc. the former licensee of Station KLSU was permitted to intervene under the discretionary provisions of Section 1.223(b) of the Commission's Rules. Intervenor is the holder of a note secured by a mortgage on the assets of Station KLSU on which the sum of $37,984 plus interest was due at the time of intervention. Prehearing conferences were held on June 26, 1972 and July 26, 1972. Hearing was held November 14, 1972 and the record closed on that date. Proposed findings of fact and conclusions of law were filed December 21, 1972 by the Broadcast Bureau and December 28, 1972 by Shedd-Agard. The findings of fact and conclusions of the Broadcast Bureau are in substance adopted herein as they fully reflect the record and the conclusions logically to be drawn therefrom.

FINDINGS OF FACT

3. Shedd-Agard acquired the license for Station KLSU from Big League Broadcasting Company, Inc. (hereinafter Big League) pursuant to Commission authorization granted January 20, 1970 (Application File No. BAL–6775). The only ownership report (FCC Form 323) filed by Shedd-Agard was submitted March 12, 1970 reporting consummation of the assignment of license authorized by grant of this application. The following were reported as the officers, directors and stockholders of Shedd-Agard: James H. Shedd, President, director and 50 percent shareholder; Leland H. Agard, Vice-President, Treasurer, director and 50 percent shareholder; Thomas I. Redd, Secretary and director.

4. In April or May of 1970 Leland Agard left Station KLSU and James Shedd assumed full control and management of the station. June 12, 1970 Mr. Agard sold without Commission authorization, his 50 percent stock interest in Shedd-Agard to Mr. Shedd by a document entitled "Sale With Assumption." The document provided, *inter alia*, that Leland Agard agreed to sell, transfer, convey and deliver with full warranty of title and with subrogation to all rights and actions of warranty seller may have seventy-five shares of Shedd-Agard Broadcasting, Inc. to J. Harold Shedd for the sum of $9,365 in the form of a promissory note bearing interest at the rate of 7½% and payable weekly at the rate of $70.52 plus interest. Thereafter, Mr. Agard had no further contact with the licensee corporation or the station. This transfer was not reported to the Commission.

5. July 24, 1970 Mr. Richard Ellis, Jr., a part-time employee of Station KLSU, paid Mr. Shedd $1,500 for a 5 or 10 percent interest in Station KLSU. Mr. Ellis' interest was subsequently repurchased by Mr. Shedd at or about the time he sold a 100 percent interest in

KLSU to Harry A. Womack. These transactions were not reported to the Commission.

6. September 19, 1970 Mr. Shedd sold his 100 percent interest in Shedd-Agard to Harry A. Womack by means of a document entitled "Sale With Mortgage and Assumption of Mortgages." This transaction was not reported to the Commission. Mr. Shedd did not thereafter participate in the operation of Station KLSU. Mr. Womack operated Station KLSU from the date he purchased the station until he later sold it to MacDonald Lynch.

7. Mr. Shedd first entered broadcasting in 1955 when he was employed as an announcer. He holds a first-class radiotelephone license and remained active in broadcasting from 1955 until he sold Station KLSU to Mr. Womack. In the past he was a 50 percent owner and manager of Station WWCC in Bremen, Georgia. As manager he was the person principally responsible for its operation and the filing of license renewal applications on behalf of the licensee. He performed these duties during his tenure at WWCC from 1962 through 1969. He signed assignment applications when his interest in Station WWDC was acquired and disposed of and when Shedd-Agard purchased Station KLSU. When he bought Mr. Agard's interest in Station KLSU and when he sold and repurchased Mr. Ellis' interest, Mr. Shedd understood that the Commission expected to be informed of such sales so as to have the opportunity to pass on them.

8. During his tenure as KLSU's owner, Mr. Womack employed Messrs. Earl Myers and Terry Broussard to operate the station. They were given full power to hire and fire personnel and to determine program content. Mr. Womack, however, retained the power to sign all checks disbursing funds.

9. By agreement executed December 9, 1970 Mr. Womack sold his interest in Station KLSU to Mr. MacDonald Lynch. The agreement was signed by Mr. Womack and by Mr. Bob G. Watson as Mr. Lynch's agent. The "Contract to Sell" called for the seller to convey to buyer all of his right, title and interest in Station KLSU. This transaction was not reported to the Commission. Since that date Mr. Watson has been employed by Mr. Lynch as the General Manager of Station KLSU with the power to hire and fire employees and control program content.

10. Mr. Patrick W. Pendley signed as Secretary of Shedd-Agard a notice of a special meeting of the Board of Directors dated October 25, 1971. His election as Secretary of the corporation has at no time been reported to the Commission.

11. December 29, 1970, William J. Simpson, the Commission's Engineer in Charge New Orleans, Louisiana, issued an "Official Notice of Violation" (FCC Form 793–A) in the operation of Station KLSU noting the following violations based on an inspection conducted

(1) SEC. 73.47(b)—Failure to provide data concerning equipment performance measurements as required by Section 73.47(a).

(2) SEC. 73.92(a)—The radio station license was not posted or available for inspection.

(3) SEC. 73.93(c)—There was no evidence that a full-time first-class operator was employed, or as an alternative, a contract with a first-class operator to pro-

December 22, 1970:

vide the required services. (There was no operator license or verification posted and no copy of a contract in the files of the engineer in charge.)

(4) SEC. 73.111(a)—There was no evidence that an operating log required by Section 73.113 was maintained on Dec. 20, 21, or 22 (the day of the inspection), 1970.

(5) SEC. 73.48(a)(1)—At the time of the inspection, one of the Type 833A final tubes was inoperative as the filament was out. The other tube was cherry red because of the overload. (This transmitter is not acceptable for licensing with only one type 833A tube operating in the final amplifier at a power of one kw.)

(6) SEC. 73.40(b)(4)—The wiring in the vicinity of the antenna ammeter is a hazard and should be provided with protection so that it cannot be touched by personnel.

(7) SEC. 73.40(c)(1)—The wiring in the vicinity of the monitors is not properly cabled and supported and provided with mechanical protection.

(8) SEC. 1.526(a)—There was no evidence that a file for the records available for public inspection was maintained. (Copies of the required applications, ownership reports, etc. were not available for inspection.)

(9) SEC. 73.60(a)—At the time of inspection, the frequency monitor was inoperative. (The monitor was turned on and indicated a deviation of minus 7 Hz; however, when the transmitter was turned off, it still indicated minus 7 Hz. In addition, the crystal chamber thermostat was inoperative.)

(10) SEC. 73.56(a)—The modulation monitor flasher peak indicator was inoperative. (The monitor is not type accepted unless the peak indicator is operative.)

(11) SEC. 73.933(a)—An EBS receiver capable of receiving the Emergency Action Notifications was not installed.

(12) SEC. 73.92(b)—The license for operator R. D. Rosenberger was not posted or available. (His name appears on the log December 19, 1970 and other dates.)

(13) SEC. 73.111(a)—There was no evidence that a maintenance log required by Section 73.114 has been maintained.

(14) SEC. 73.113(a)(6)—The operating logs do not include the required daily inspection of the tower lights as required by Section 17.49(b).

(15) SEC. 73.52(a)—At the time of the inspection, the operating power was 805 watts which is not within the required tolerance for a 1,000 watt station. There is no evidence that the engineer in charge was notified of this under-power operation.

12. November 10, 1971, a second inspection of KLSU was conducted by Engineer in Charge Simpson which resulted in issuance of an "Official Notice of Violation" (FCC Form 79–A) on March 14, 1972, noting the following violations:

(1) SEC. 73.47(b)—Failure to provide data concerning equipment performance measurements as required by Section 73.47(a). (Send copies of any measurements made in the past two years to this office for review.)

(2) SEC. 73.113(a)(3)—At the time of the inspection, 9:33 a.m., the transmitter meter readings had not been entered in the operating log for the 9:00 a.m. and the 9:30 a.m. observations.

(3) SEC. 73.112(a)—No program log had been maintained from the time of commencement of operation at 6:30 a.m. on November 10, 1971 until the time of the inspection at 9:33 a.m., on the same date.

(4) SEC. 73.56(a)—The modulation monitor was inoperative and turned off. There was no evidence that the Engineer in Charge had been notified or that an alternate means of monitoring was being employed.

(5) SEC. 73.60(a)—The frequency monitor was inoperative and turned off. There was no evidence that the Engineer in Charge had been notified or that external checks were being made.

(6) SEC. 73.92(b)—The original license, or FCC Form 759, was not posted for Mr. Frank L. Landry, the operator on duty. In your reply, advise the license number and date of issuance of his license.

(7) SEC. 73.92(b)—The original license, or FCC Form 759, was not posted for Mr. Richard Ellis, a part-time operator. In your reply advise the license number and date of issuance of his license.

(8) SEC. 73.92(b)—The original license, or FCC Form 759, was not posted for Mr. Leonard Benson, the contract first-class operator. In your reply, advise the license number and date of issuance of his license.

(9) SEC. 73.933(a)—A receiver for the EBS Emergency Action Notifications was not provided.

(10) SEC. 73.40(c)(1)—The wiring in the monitoring rack at the transmitter location was not properly cabled and supported.

(11) SEC. 73.113(a)(3)—The actual plate current readings were not being logged in sufficient detail. At the time of the inspection, the actual current was .560 amperes, but it was logged as .5 amperes. Previous logs indicated entries of only .5 amperes. In addition, at the time of the inspection, the antenna current was 4.90 amperes, yet 4.75 amperes was logged.

(12) SEC. 73.93(c)—A copy of the written contract between Mr. Leonard Benson, the contract first-class operator, and KLSU, was not in the station files or the files of the Engineer in Charge.

(13) SEC. 1.526(a)(3)—The records available for public inspection file did not contain a copy of the latest station ownership report or any correspondence relative to the ownership report.

(14) SEC. 73.113(a)(6)—The daily inspection of the tower lights as required by Section 17.49(b) was not logged on October 25, 26, 27, 28, and November 2, 3, 4, 5, 9, 1971.

(15) SEC. 73.52(a)—At the time of the inspection the antenna current was 4.90 amperes which indicated a power output of 1070 watts which is more than allowed.

(16) SEC. 73.114(b)—The maintenance log does not indicate the amount of time, exclusive of travel time, devoted to the inspection. It also does not include a statement as to the reason for failure to make satisfactory repairs to the modulation monitor and frequency monitor which are logged as being inoperative for nine months.

(17) SEC. 73.111(a)—Entries were made in the operating log on numerous dates by operators who did not have actual knowledge of the facts. For instance, on Feb. 18, 19, March 7, 8, April 27, 28, May 18, 19, 1971, entries in the operating log indicated that the transmitter frequency deviation, according to the frequency monitor, was minus 5 Hz. At this time, according to the maintenance log, however, the frequency monitor was inoperative. Other operators made similar entries on other dates.

Shedd-Agard has admitted to all of the foregoing rule violations cited in the notices of December 29, 1970 and March 14, 1972.

13. Following issuance of the notice of violations on December 29, 1970, Mr. Watson corrected those he was able to remedy without spending money for new equipment. He conceded that the transmitter and "several other pieces of equipment" needed replacements at that time and still do.

14. Mr. Shedd appeared in behalf of Shedd-Agard and testified that the unauthorized transfers were the result of financial difficulties. Station KLSU operated at a loss from the time he and Mr. Agard took it over until he sold to Mr. Womack. At the time he and Mr. Agard took over they had a limited amount of capital after making the initial down payment. They borrowed $3000 from the Bank of White Castle in June or July of 1970. Shortly thereafter due to the financial problems some conflict arose between Mr. Shedd and Mr. Agard regarding the steps to be taken to permit continued operation. This led to Mr. Agard selling to Mr. Shedd. Mr. Shedd then borrowed another $5000 for station operations. At the time of his sale to Mr. Womack there was an intent to file an application for Commission consent. Mr. Womack, however, then sold to Mr. Lynch through Mr. Watson so the application was not filed.

CONCLUSIONS

15. In designating for hearing the matter of the revocation of the license of Shedd-Agard Broadcasting, Inc. the Commission stated that the information which gave rise to the issues had come to its attention

since grant of the subject license. It noted that this information would, if substantiated, warrant a refusal to grant a license or permit on an original application, and raises serious questions, best resolved in a hearing, as to whether Shedd-Agard Broadcasting, Inc. has the qualifications to be a licensee of the Commission. The information brought to the Commission's attention has been fully verified in the hearing and warrants revocation of the license for Station KLSU.

16. Section 310(b) of the Communications Act of 1934, as amended, provides, in pertinent part, as follows:

> No construction permit or station license, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience and necessity will be served thereby.

17. The evidence adduced in this proceeding demonstrates conclusively three instances of unauthorized transfer of control of Station KLSU. The first occurred when Mr. Agard sold his 50% interest in the station to Mr. Shedd. By this sale Mr. Agard surrendered negative control over the station and Mr. Shedd assumed positive control. The second occurred when Mr. Shedd sold 100% of the stock to Mr. Womack. The third occurred when Mr. Womack sold 100% of the stock to Mr. Lynch. Each of these sales occurred without compliance with the aforenoted statutory provisions of Section 310(b) of the Act.

18. Since the sale by Mr. Shedd of his ownership interest, there has been total abdication of control and supervision over the operation of Station KLSU by the licensee. Since that date it has been owned and operated by strangers to the Commission.

19. Section 1.613 of the Commission's Rules requires that each licensee of a standard broadcast station shall file with the Commission copies of contracts relating to ownership or control within 30 days of execution thereof. Section 1.613(b) of the Rules requires a licensee to report to the Commission every sale of stock heretofore found to have taken place since Shedd-Agard became a licensee, i.e., the sale from Agard to Shedd; the sale from Shedd to Ellis, Shedd's repurchase from Ellis; Shedd's sale to Womack; and Womack's sale to Lynch. None of those sales was ever reported to the Commission. Shedd-Agard, accordingly, has repeatedly violated Section 1.613 of the Commission's Rules.

20. Section 1.615 of the Commission's Rules required that a supplemental Ownership Report (FCC Form 323) shall be filed by each licensee within 30 days after any change occurs in the information required by the Ownership Report from that previously reported, such report to include, *inter alia*, any change in officers and directors and any transaction affecting the ownership, direct or indirect, or voting rights of licensee's or permittee's stock, such as a transfer of stock. Patrick W. Pendley signed as Secretary of Shedd-Agard on a notice of a special meeting of the Board of Directors dated October 25, 1972. The only ownership report filed by Shedd-Agard lists Thomas I. Redd as Secretary. Thus, Shedd-Agard has violated Section 1.615(c)(2) of the Rules and the numerous aforenoted unreported stock transfers each constituted a violation of Section 1.615(c)(3)(i) of the Rules.

21. In the operation of Station KLSU the Commission's Rules have been violated as alleged in the Official Notices of Violation issued December 29, 1970 and March 14, 1972. Though Mr. Watson testified that some of the violations which could be corrected without expending money, were remedied, replies to these notices were not filed as required and it is admitted that a number of the violations are continuing.

22. Every evidentiary issue has been resolved against the licensee. Every fact alleged in the Bill of Particulars has been proven. In mitigation, the licensee has alleged that financial difficulties forced Messrs. Shedd and Agard out of the operation. They were, however, fully aware of the necessity of securing Commission consent pursuant to the requirements of the Communications Act of 1934, as amended, and of the Commission's Rules. Consent was not requested and since September 29, 1970, station KLSU has been owned and operated by strangers to the Commission. Notices of numerous violations issued twice during this period have been ignored and are continuing to be ignored.

23. By its proposed conclusions of law Shedd-Agard recognizes that it should not be permitted to continue to operate Station KLSU under its unauthorized ownership. It urges, however, that "In the interest of justice and equity, Shedd-Agard be allowed to transfer or assign the license to another person or corporation to prevent irreparable damage and harm to come to an innocent third party" namely, Big League Broadcasting Company, Inc. It proposes that the transfer or assignment be under such terms and conditions that Shedd-Agard will not realize a profit, the assignment to be made for the amount of the outstanding debts of the corporation. This standing alone, however, does not constitute mitigating circumstances warranting condoning of the willful, flagrant and repeated violations of both the Communications Act of 1934, as amended, and of the Commission's Rules here involved. Preservation of the integrity of the Commission's processes and the interest of the public permit no course other than revocation of license under the circumstances here present.

Accordingly, IT IS ORDERED, in accordance with Section 312 (a) (2) and (4) of the Communications Act of 1934, as amended, that unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules the license of Shedd-Agard Broadcasting, Inc. for operation of Station KLSU White Castle, Louisiana is revoked.

In the absence of action taken under Section 1.276 of the Commission's Rules, the effective date of this order of revocation shall be 50 days after public release of the full text of this Initial Decision. (See Sections 1.91(f) and 1.276(d) of the Rules.)

IT IS FURTHER ORDERED, That copies of this Initial Decision be served on respondent Shedd-Agard Broadcasting, Inc. by United States Government certified mail, return receipt requested, to its address of record and also in care of Patrick W. Pendley, Esquire, Post Office Drawer 71, Plaquemine, Louisiana 70764.

FEDERAL COMMUNICATIONS COMMISSION.
FOREST L. MCCLENNING, *Administrative Law Judge.*

F.C.C. 73-555

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of:	
TELEVISION CABLE CO., INC., CONWAY, S.C.	CAC-597
For Certificate of Compliance and Waiver	SCO23
of Network Exclusivity Protection	SR-37107

MEMORANDUM OPINION AND ORDER

(Adopted May 23, 1973; Released May 30, 1973)

BY THE COMMISSION:

1. On June 9, 1972, Television Cable Company, Inc. applied for a Certificate of Compliance to add a number of new television broadcast signals to its existing cable television system at Conway, South Carolina, a community located outside of all television markets. Television Cable Company (hereinafter TCC) now carries the following signals:

WWAY (ABC), Wilmington, North Carolina
WECT (NBC), Wilmington, North Carolina
WSOC-TV (NBC), Charlotte, North Carolina
WCIV (NBC), Charleston, South Carolina
WSCS-TV (CBS), Charleston, South Carolina
WCBD-TV (ABC), Charleston, South Carolina
WIS-TV (NBC), Columbia, South Carolina
WBTW-TV (CBS), Florence, South Carolina
WJIM-TV (Educ.), Florence, South Carolina

Originally, it proposed to add these distant signals:

WBTV (CBS), Charlotte, North Carolina
WRET-TV (Ind.), Charlotte, North Carolina
WNOK-TV (CBS), Columbia, South Carolina
WOLO-TV (ABC), Columbia, South Carolina

This application drew the immediate responses of the Daily Telegraph Printing Company, licensee of WBTW, Florence, South Carolina, and Clay Broadcasting Corporation, licensee of WWAY, Wilmington, North Carolina. Both stations place a predicted Grade B contour over Conway, South Carolina and, as indicated above, are carried by TCC. Each pleading took the form of a "Request for Network Exclusivity", arguing that certification of this application should be denied or delayed until the stations were assured that their network programing would be adequately protected against duplicating distant signals.

2. Daily Telegraph and Clay Broadcasting rely upon that part of Section 76.27 of the Rules which provides that:

> Controversies concerning carriage (Subpart D) and program exclusivity (§ 76.91) will be acted on in connection with the certificating process if raised

within thirty (30) days of the public notice; any other objection will be treated as a petition for special relief filed pursuant to § 76.7.

However, while Clay Broadcasting's concern was limited to the proposed carriage of WOLO–TV, a distant ABC-affiliated station, Daily Telegraph incorporated its long-outstanding controversy with TCC regarding the latter's petition to waive the exclusivity provisions of former Section 74.1103, as well as seeking assurance that WBTW would be protected against distant CBS affiliates WBTV and WNOK–TV. Following the submission of these pleadings, TCC amended its application to delete the requested carriage of WBTV, WNOK–TV and WOLO–TV; as a result, only the independent station WRET–TV, Charlotte, North Carolina, is now proposed.

3. TCC argues that, by thus amending its application the requests for exclusivity protection filed by Clay Broadcasting and Daily Telegraph have been rendered moot. Moreover, TCC contends that its petition requesting a waiver of the exclusivity provisions of Section 74.1103 is the subject of an entirely separate proceeding wholly unrelated to the disposition of the subject application for Certificate of Compliance. Otherwise, TCC states that the certificating process envisioned by the Commission will be encumbered by matters extraneous to its intended operation; that only delay and disruption can result from the injection of old and contentious program exclusivity controversies. Daily Telegraph's response was to renew its request for program exclusivity protection for WBTW against WCSC–TV, Charleston, South Carolina. While it agreed that its request for exclusivity vis-a-vis WNOK–TV and WBTV had been rendered moot, Daily Telegraph argued that the Commission did not intend to preclude the resolution of outstanding exclusivity proceedings from the certificating process. According to Daily Telegraph, consolidating and resolving such pending matters within the context of one proceeding would obviously serve the public interest.

4. We agree with Daily Telegraph. In the *Cable Television Report and Order*, 36 FCC 2d 143 (1972), we provided for the resolution of exclusivity disputes within the context of the certificating process if such matters were timely filed and stated, at page 186:

> Objections to proposed cable service may be made within 30 days after the Commission's public notice. Controversies concerning carriage (Subpart D) and network program exclusivity (§ 76.91) will be acted on in the certificating process if raised within 30 days of the public notice. Such matters may be raised at any time and will be considered under the special relief rules but outside the certificating process.

This procedure was thereafter incorporated into the cable television rules as Section 76.27. Obviously, there must be limits as to the type of objection which can be raised pursuant to this rule. In *Televents of Brentwood*, FCC 73–448, —— FCC 2d ——, we refused to consider an objection under Section 76.27 which involved an ongoing dispute between a television station and another cable system operated by the applicant for certification. That dispute was never the subject of formal proceedings before the Commission, although there was ample opportunity to do so. Here, however, the objection was timely filed, concerned the same cable system for which certification was requested, and referred to a controversy pending before the Com-

mission. The public interest would be ill-served if this opportunity to lay to rest a long outstanding controversy were ignored.

5. Turning then to this matter of program exclusivity, the pleadings disclose that on March 9, 1971, TCC requested a waiver of former Section 74.1103 to avoid compliance with the network program exclusivity rules. TCC carried CBS affiliate WCSC, Charleston, South Carolina and WBTW, Florence, South Carolina, and did not wish to extend same-day nonduplication protection to WBTW, although this station placed a higher priority signal over Conway. The following arguments were made in support of this waiver: (a) providing network exclusivity protection would be especially expensive for a cable system operating on a small margin of profit and (b) affording such protection to WBTW would disrupt long-established viewer preference for the programming of WCSC. We have consistently rejected such arguments in the past, and we find them no more persuasive today. See *Orgeon CATV, Inc.*, 21 FCC 2d 214 (1970); *KBTN Cable TV, Inc.*, 25 FCC 2d 99 (1970); and *Grangeville TV Service, Inc.*, 32 FCC 2d 653 (1971), for representative opinions. Accordingly, TCC's request for a waiver of the network exclusivity rules must be denied.

6. It is not disputed that TCC's application for a Certificate of Compliance is consistent with the rules. The addition of a distant independent signal to a cable television system located outside of all television markets comports with Section 76.57(b) of the Rules and the application will be granted.

In view of the foregoing we find that a grant of this application would serve the public interest. However, a certificate of compliance will not issue until we receive satisfactory assurances from the parties that TCC is providing network exclusivity protection in accordance with Section 76.93 of the Rules.

Accordingly, IT IS ORDERED, That the application for certificate of compliance, filed by Television Cable Company, Inc., Conway, South Carolina, IS GRANTED, subject to the condition described above.

IT IS FURTHER ORDERED, That the "Petition for Waiver," filed March 9, 1971, by Television Cable Company, Inc., Conway, South Carolina, IS DENIED.

IT IS FURTHER ORDERED, That the "Continued Request for Network Exclusivity Protection" filed by Daily Telegraph Printing Company, Florence, South Carolina, IS GRANTED.

IT IS FURTHER ORDERED, That the "Request for Network Exclusivity Protection" filed by Clay Broadcasting Corporation, Wilmington, North Carolina, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 73-496

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application for Review by
THE WILDERNESS SOCIETY, NATIONAL RESOURCES DEFENSE COUNCIL, AND PUBLIC ACTION TO PROTECT ENVIRONMENTAL RESOURCES
Letter of January 12, 1973, by the Broadcast Bureau

MAY 9, 1973.

THE WILDERNESS SOCIETY, NATIONAL RESOURCES DEFENSE COUNCIL, AND PUBLIC ACTION TO PROTECT ENVIRONMENTAL RESOURCES
c/o Center for Law and Social Policy,
1600 Twentieth Street, N. W.,
Washington, D.C. 20009.

GENTLEMEN: This will refer to your Application for Review filed on January 26, 1973 in response to the Broadcast Bureau's letter to you dated January 12, 1973. The Commission also has before it the comments of the American Broadcasting Companies, Inc., titled Opposition to Application for Review filed on February 12, 1973 and your Reply to American Broadcasting Companies, Inc.'s Opposition to Application for Review filed on February 13, 1973.

In your initial complaint to the Commission dated December 21, 1972 against WABC–TV, New York and WMAL–TV, Washington, D.C. you stated that during the American Broadcasting Company's coverage of the 1972 Summer Olympics, Weyerhaeuser Company repeatedly sponsored commercials which were "designed to convince the American public that the forestry practice of 'clearcutting'[1] is socially and environmentally desirable"; that "clearcutting may endanger our forest lands and is a controversial issue of public importance; that the American Broadcasting Company refused to broadcast counter-spots and other programming explaining the harmful effects of "clearcutting" because it believed that the commercials which it broadcast did not discuss one side of a controversial issue; and that "even if previous newscasts, documentaries, interview shows, etc., all presented a balanced number of spokesmen on each side of the issue . . . the broadcasters have an obligation to balance the Weyerhaeuser commercials." You asked the Commission for the following relief:

(1) Order the broadcasters to furnish the Commission copies of the actual Weyerhaeuser commercials and make these copies part of the record of these proceedings.

[1] Complainants state that "the practice of clearcutting results in the removal of all trees in a given area, at one time, regardless of age or condition."

(2) Order the broadcasters to identify programming scheduled for the next three months that might allow contrasting views on the clearcutting question to reach a viewing audience comparable to that reached by the Weyerhaeuser commercials.

(3) Order ABC, its owned and operated station WABC–TV in New York, and WMAL–TV in Washington to comply with their fairness doctrine obligations to promptly redress the imbalance of their programming related to clearcutting—the efficacy of such steps to be judged in light of the astounding size of the audience reached by the Weyerhaeuser commercials and the visual and audial impact of those commercials.

(4) Because of the substantial time that has already elapsed, make known its decision on this important matter as promptly as possible.

In response to your complaint the Broadcast Bureau in a letter dated January 12, 1973 stated:

> One of the essential elements the Commission requires from a complainant for establishing a prima facie fairness doctrine case is information which substantiates the claim that the station or network broadcast only one side of the issue *in its overall programming*, and whether the station or network has afforded or plans to afford a reasonable opportunity for the presentation of contrasting viewpoints on that issue. See *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969). You have not presented the Commission this information. Should you provide that necessary information further consideration in this case will be given by the Commission.

In your Application for Review you request that the Commission reverse the Broadcast Bureau's determination set forth in its letter of January 12. You state that the staff does not take issue with your contention that the Weyerhaeuser commercials presented one side of a controversial issue but rather rejected the complaint solely on procedural grounds; that the staff's determination is both factually and legally erroneous and is in conflict with the letter and spirit of the Commission's Procedural Manual; that the staff imposes a totally unnecessary and unreasonable evidentiary burden on complainants that "renders virtually meaningless both the fairness doctrine and the Section 315 obligations of broadcasters to deal evenhandedly with important public issues; that *Allen C. Phelps*, 21 F.C.C. 2d 12, 13 (1969) cited in the Broadcast Bureau's letter is clearly inapposite to the facts of the case; and that the staff's rejection of the instant complaint is an arbitrary departure from the Commission's normal handling of similar fairness doctrine complaints.

Specifically, you state that the *Procedural Manual*[2] requires fairness doctrine complainants to communicate their complaints to the concerned broadcaster and in compliance with the requirement you communicated your complaint on October 17, 1972 to the appropriate broadcasters; that ABC nowhere contended that programming prior to or subsequent to the Weyerhaeuser commercials was balanced on the clearcutting issue; and that ABC rejected complainants' request solely on the ground that the commercials did not address clearcutting with sufficient clarity so as to constitute a discussion of a controversial issue.

[2] 37 Fed. Reg. 20572 (1972).

You also state that in light of ABC's response and the information you have submitted, it is unreasonable as a matter of policy and law to impose any further evidentiary burden on complainants; that *Phelps* involved a license renewal case in which the complainants challenged in "vague and general terms the totality of the licensee's programming," unlike the facts of this case where the charges are concrete and specific and the controversial issue is a narrow one; that *Phelps* has been cited with approval by the Court of Appeals only in (a) cases like *Phelps* which have presented similarly broad challenges to the licensee's general programming, or (b) cases which in the judgment of the Commission and/or Court are so general in nature as to place an unreasonable burden on the licensee to establish that its overall programming was in fact balanced; that the staff's reliance on *Phelps* in the instant case is arbitrary and a departure from normal Commission practice in similar fairness cases; that in similar fairness cases the Commission has required the broadcaster—who has the relevant information at his fingertips—to document a contention that the issue has received balanced treatment, citing *Letter to Business Executives' Move for Vietnam Peace* 25 F.C.C. 216 (1970), *Letter to National Broadcasting Co.*, 30 F.C.C. 643 (1971), and The Court of Appeals decision in *Friends of the Earth* v. *F.C.C.* 449 F. 2d 1164 (1971).

ABC in its Opposition to Application for Review states that the Commission has long held that before the Commission will submit fairness doctrine complaints to the broadcaster for its comments the complaints must include a reasonable basis for the claim that only one side of an issue had been presented and a showing that the broadcaster does not plan to afford in the future the presentation of contrasting views; that complainants asserted that the Weyerhaeuser commercials specifically required "balanced" counter-treatment regardless of other programming, but failed to show that ABC only presented one side of the clearcutting issue in its overall programming; that courts have upheld the Commission's procedural manual requirements regarding the fairness doctrine; that the staff's determination in this case was fully consistent with established Commission policy guidelines; and that the staff's determination that the complaint was procedurally lacking did not prejudice further consideration of the matter if complainants subsequently meet their initial burden of proof.

In your reply to ABC's opposition you state that ABC "side steps the issues presented in the complaint and Application for Review"; that again ABC does not contest complainants' allegation that no material was broadcast which presented opposing views to those of Weyerhaeuser by any of the broadcasters, except WMAL's one-minute coverage on January 20, 1973; that ABC makes no claim that it has presented or intends to present viewpoints on clearcutting which differ from those of Weyerhaeuser; that ABC has repeatedly failed to give the complainants evidence of past and future programming which presented an opposing view to the Weyerhaeuser commercials; and that complainants have met the criteria set forth in *Allen C. Phelps*, *supra*, and the *Fairness Doctrine Primer* for establishing a *prima facie* fairness doctrine case.

The Commission policy regarding procedural requirements necessary to set forth a *prima facie* fairness doctrine case is well defined and

long established in our rulings and Court precedent. In 1960 the Commission in a letter addressed to *Lar Daly*, 40 F.C.C. 306 (1960), set forth the elements necessary for a sufficient fairness doctrine complaint, including "the basis for the claim that the station presented only one side of the question, and whether the station had afforded an opportunity for the presentation of differing viewpoints."

The procedural requirements were established to process fairness complaints as expeditiously as possible and to eliminate improper interference with licensees' day-to-day programming. (Cf. *Letter to Oren Harris*, 40 F.C.C. 582 (1963). The Commission in its 1964 *Fairness Primer*, 29 Fed. Reg. 10415, 10416, reiterated its policy with respect to fairness doctrine cases when it stated:

> Where complaint is made to the Commission, the Commission expects a complainant to submit specific information indicating (1) the particular station involved; (2) the particular issue of a controversial nature discussed over the air; (3) the date and time when the program was carried; (4) the basis for the claim that the station presented only one side of the question; and (5) whether the station had afforded, or has plans to afford, an opportunity for the presentation of contrasting viewpoints.
>
> If the Commission determines that the complaint sets forth sufficient facts to warrant further consideration, it will promptly advise the licensee of the complaint and request the licensee's comments on the matter. Full opportunity is given to the licensee to set out all programs which he has presented, or plans to present, with respect to the issue in question during an appropriate time period. Unless additional information is sought from either the complainant or the licensee, the matter is then usually disposed of by Commission action.[3]

The Commission in *Allen C. Phelps*, *supra*, made it clear that the initial burden in cases arising from a fairness doctrine complaint rests not with the licensee but with the complainant.[4] The burden of proof on complaints under *Phelps* was cited with approval by the Court of Appeals in *Democratic National Committee* v. *CBS, Inc.*, 148 U.S. App. D.C. 383, 460 F. 2d 891 (1972). Moreover, in *Healey* v. *F.C.C.*, 148 U.S. App. D.C. 409, 460 F. 2d 917 (1972), the Court stated:

> On a complaint under the fairness doctrine, the burden is not only on the complainant to define the issue, but also to allege and point specifically to an unfairness and imbalance in the programming of the licensee devoted to this particular issue. It is not enough for the complainant to allege there is a controversial issue of public importance on which the complainant wants to be heard on the licensee's station. The essential element in involving the fairness doctrine is that the licensee has not hitherto provided fair and balanced programming on this particular issue, and therefore and only therefore, can the complainant assert a right for someone to be heard to rectify the existing imbalance.

The Commission has applied the same procedural requirements to all fairness cases despite differing factual situations. See *Procedural Manual*, *supra*. The elements stated above which are necessary to establish a *prima facie* fairness doctrine case were never meant to be limited to challenges to a station's total programming; rather they were meant

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[3] These five categories have continuously served as the Commission guideline in determining whether a complainant has established sufficient facts to warrant requesting the licensee to set out all programming which he has presented or plans to present with respect to the issue in question. In cases where a complainant has failed to provide the necessary information he is asked to supply the missing elements before the Commission will give his complaint further attention.

[4] The Commission in *Phelps* listed the elements necessary for a *prima facie* fairness doctrine complaint including a reasonable basis for complainant's conclusion that the licensee failed in its overall programming to present a reasonable opportunity for contrasting views.

to apply to any fairness doctrine complaint. A blanket statement such as "the station has not presented any opposing point of view" does not satisfy the fairness doctrine's procedural requirements listed in *Phelps*. The Commission requires some reasonable basis for complainant's conclusion that the station has broadcast no opposing views in its news reports, editorials, commentary, public affair shows, documentaries and other programming. Thus, regarding your contention that the staff should not rely on the requirements for a fairness doctrine complaint as set forth in *Phelps*, we reject your conclusion and shall continue to apply the procedural elements enumerated in *Phelps* to fairness doctrine cases, at least pending conclusion of our current inquiry into the fairness doctrine in which these matters are being considered.[5]

You state that you have met the burden of proof demanded of complainants as set forth in the *Fairness Primer*, *supra*, and have provided the Commission with a reasonable basis for your conclusion that ABC has not broadcast opposing views in its overall programming. In your initial complaint to the Commission you state: "Having failed to air contrasting viewpoints to those of Weyerhaeuser the broadcasters have failed to meet their obligations under the fairness doctrine"; and that even if previous newscasts, documentaries, interview shows, etc., all presented a balanced number of spokesmen on each side of the issue, the broadcasters have an obligation to balance the Weyerhaeuser commercials. In your Application for Review you cite an alleged ABC response in which ". . . ABC does not contend that its programming has been such that the Weyerhaeuser commercials represent merely one side of reasonable balanced programming on the clearcutting issue," and claim that this shows that you met the *Procedural Manual's* requirement to set forth specific information concerning the basis for your allegation that the station or network has not broadcast contrasting views in its overall programming. You argue that "under these circumstances, it is unreasonable as a matter of policy and law to impose any further evidentiary burden on complainants." Finally, in your reply to ABC you state that ABC does not contest your allegation that no opposing views were presented to the Weyerhaeuser commercials except WMAL's one-minute coverage on January 20, 1973. From the information provided, we conclude that you have failed to provide any reasonable basis for your conclusions that WABC–TV and WMAL–TV failed to provide a reasonable opportunity for the broadcast of contrasting views in its overall programming. The fact that ABC does not address its response to this aspect of your complaint does not prove that your allegation is true as you suggest. Again it is your initial burden to provide the specific information enumerated in *Phelps*. As to your statement that even if previous ABC newscasts, documentaries, interview shows and other programming presented a balanced number of spokesmen on each side of the clearcutting issue, the broadcaster would still have an obligation to specifically balance the Weyerhaeuser campaign, the Commission has never isolated or categorized commercials as a separate entity in applying the fairness

[5] *Notice of Inquiry*, 30 F.C.C. 2d 636 (1971). Of course we do not speculate at this time on what, if any, effect our inquiry will have on *Phelps*.

doctrine. The Commission has always looked to the overall programming in determining whether the broadcaster has met his fairness doctrine obligations. Thus we reject your contention that the Weyerhaeuser commercials should be isolated from other programming in applying the fairness doctrine.

You also state that you communicated your complaint to the concerned broadcaster before bringing it to the Commission in accord with the requirements of the *Procedural Manual, supra;* that the procedure of first notifying the broadcaster is designed to permit him to explain his position; that the process rests on the honest and full statement of the broadcaster who is under an obligation to deal openly and honestly with the public; that ABC is in "a unique position to provide the Commission with evidence of past programming and future intentions"; that ABC has failed to provide you upon your request past programming information and that to place any additional burden upon complainants is clearly inconsistent with the spirit of the fairness doctrine.

The Commission in its *Procedural Manual* states with regard to fairness doctrine complaints:

> If you believe that a broadcast (station or network) is not meeting its obligation to the public under the fairness doctrine, you should complain first to the broadcasters . . . barring unusual circumstances, complaints should not be made to the Commission without affording the broadcaster an opportunity to rectify the situation, comply with your request, or explain its position.

These rules were promulgated in order to provide the broadcaster with an opportunity to answer all complaints before they reach the Commission. It is our hope that complainants and the broadcaster can solve their differences without involving the Commission. However there is no obligation on the broadcaster to review all past programming on an issue every time he receives a fairness doctrine complaint. If stations had to review all their past programming every time they received a fairness doctrine complaint, they would face such a burden as to discourage broadcasts dealing with controversial issues. The Commission does request such past programming information from broadcasters when it has received a *prima facie* fairness doctrine case and the case warrants such information. Even with present procedures, one might reasonably "question whether a process of categorizing and quantifying presentations, times, and formats, in order to rule on the reasonableness of a licensee's judgment, does not involve the Commission too deeply in day-to-day journalistic practices." *Wilderness Society*, 31 FCC 2d 729, 737 (1971) (concurring statement of Chairman Burch). Where the complainant has not presented a *prima facie* case, we believe that the public interest would be ill-served by requiring a broadcaster to search his files, probe the memories of his newsmen, and review months of broadcast material. Such a policy would divert conscientious broadcasters from their current programming responsibilities and could well cause a timid broadcaster to think twice before taking on a controversial issue. We cannot believe that such a policy would further the central purpose of preserving an "uninhibited marketplace of ideas in which truth will ultimately prevail . . ." *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969).

We recognize that too great a burden should not be placed upon the complainant. We do not believe that we have done so, since complainant is not called upon to *prove* that no reasonable opportunity has been afforded, but only to give some substantial indication that this might be the case. We stress that the balance which must be struck here is not based upon the broadcaster's *private* interest. The public interest in robust, wide-open debate is markedly disserved if we were to adopt policies that imposed an inappropriate or undue burden of response to insubstantial fairness complaints. See above discussion. And here it is important to note that the comparative burdens to be placed on complainants and licensees in fairness cases are among the matters being considered in our current inquiry into the fairness doctrine. *Notice of Inquiry, supra.*

Under the circumstances of this case ABC has no obligation to provide you with past programming information, and we reject your conclusion that because ABC did not provide you with past programming information, the burden on you is inconsistent with the spirit of the fairness doctrine.

For the reasons set forth above, your application for review IS DENIED.

Chairman Burch absent; Commissioner Johnson dissenting.

By Direction of the Commission.
Ben F. Waple, *Secretary.*

F.C.C. 73R-203

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WNAR, INC., NORRISTOWN, PA. For Construction Permit	Docket No. 14952 File No. BP-12902

APPEARANCES

Ben C. Fisher and *Martin R. Leader*, on behalf of WNAR, Inc.; and *Martin A. Blumenthal*, *Charles A. Zielinski* and *William D. Silva*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted May 25, 1973; Released June 5, 1973)

BY THE REVIEW BOARD: BERKEMEYER AND PINCOCK. BOARD MEMBER KESSLER DISSENTING WITH STATEMENT.

PRELIMINARY STATEMENT

1. This proceeding involves the application of WNAR, Inc. (WNAR),[1] licensee of standard broadcast Station WNAR, 1110 kHz, 500 watts, non-directional, daytime only, at Norristown, Pennsylvania, for a construction permit to increase its power to 5 kw directional (1 kw directional during critical hours). By Memorandum Opinion and Order, FCC 67-186, 6 FCC 2d 718, the Commission designated the application for hearing on the following issues:

(1) To determine the areas and populations which would receive service from the proposed operation of the applicant and availability of other primary service to such areas and populations.

(2) To determine whether the proposal of Norristown Broadcasting Company, Inc. will realistically provide a local transmission facility for its specified station location or for another larger community, in the light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs;

(b) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(c) The extent to which the applicant's program proposal will meet the specific unsatisfied programming needs of the specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

(3) To determine, in the event that it is concluded pursuant to the foregoing issue (a) that the proposal of the applicant will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the Rules, including Sections 73.30, 73.31

[1] The original application was filed in 1959 by Norristown Broadcasting Company, Inc., which subsequently assigned Station WNAR to its present owner. WNAR was thus substituted in this proceeding and has since prosecuted the application.

and 73.188(b)(1) and (2) for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a total transmission service, namely Philadelphia, Pennsylvania.

(4) To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

2. On May 13, 1968, Administrative Law Judge Basil P. Cooper released an Initial Decision (FCC 68D–35), in which he concluded that the applicant had satisfactorily met its burden of proof under all of the designated issues. Subsequently, on December 2, 1968, an assignment application was granted by the Commission for transfer of Station WNAR from Norcom to WNAR. Thereafter, Norcom petitioned the Review Board for leave to amend its application to substitute WNAR as the applicant. By Memorandum Opinion and Order, FCC 69R–244, 18 FCC 2d 56, 16 RR 2d 421, the Review Board granted Norcom's request; however, the Board determined that WNAR should have the opportunity to "demonstrate at an evidentiary hearing not only the extent to which its program proposal . . . meets the specific and unsatisfied needs of its specified station location, but also the other factors utilized by the Commission in determining whether an applicant has met its burden under a suburban community issue." 18 FCC 2d at 58, 16 RR 2d at 424. On its own motion, the Board added financial issues and a *Suburban* issue as to the proposed gain area. Further hearings were held on October 14, 1969; and the record was closed on the same date. On September 29, 1971, Presiding Judge Cooper released a Supplemental Initial Decision (FCC 71D–66), in which he again resolved all the issues in favor of WNAR and recommended a grant of its application. WNAR supports the decisions and has filed no exceptions. The Broadcast Bureau has filed exceptions to the Presiding Judge's resolution of the Suburban Community issue. No exceptions were taken to the Presiding Judge's findings and conclusions on the *Suburban* and financial issues.

3. The Board has reviewed the Initial and Supplemental Decisions in light of the Bureau's exceptions, the arguments of the parties [2] and our examination of the record. We agree with the Presiding Judge's ultimate resolution of the issues in this case, with the exception of the Suburban Community issue. The Board is of the opinion that the Judge erred in his ultimate conclusion that WNAR has rebutted the 307(b) presumption of service to Philadelphia. Accordingly, we hold that, on this record and for the reasons hereinafter set forth, WNAR's application must be denied. While we disagree with the Presiding Judge's ultimate conclusion to grant WNAR's application, we adopt his findings and conclusions, except as modified in this Decision and in our rulings on the Exceptions as set forth in the Appendix attached hereto.

[2] Oral argument was held before a panel of the Review Board on December 14, 1972.

SUBURBAN COMMUNITY ISSUE [3]

4. *Technical and Engineering Considerations.* WNAR, a Class II daytime only station, is applying to increase its daytime power from 500 watts, non-directional to 5 kilowatts, utilizing a directional antenna system that is designed to radiate maximum energy in the direction of Philadelphia.[4] WNAR would utilize its present transmitter site located approximately 0.7 miles east of Norristown and 5 miles northeast of Philadelphia. The city of license, Norristown, population 38,925,[5] is the seat and largest community in Montgomery County, which has a population of 516,682 persons. At the closest point, Norristown is 4.5 miles from Philadelphia, which has a central city population of 2,002,512 persons. The *existing* 0.5 mv/m service area of WNAR extends approximately 24 miles in all directions except north toward Bethlehem, Pennsylvania, where interference from Station WGPA, Bethlehem, limits the extent of the service area to about 18 miles. The *proposed* 5 kilowatt 0.5 mv/m service area will extend about 51 miles to the southeast through Philadelphia. (For a further description of the present and proposed service areas, see paragraphs 9–12 of the Findings of Fact in the Initial Decision.)

5. In designating the Suburban Community issue, the Commission stated that because Norristown is situated approximately 15 miles from the center of Philadelphia, and WNAR's proposed operation would increase its existing 5 mv/m signal over part of Philadelphia to a 5 mv/m signal over "all" of Philadelphia, in addition to some of the latter city's surrounding areas, a presumption that the applicant is realistically proposing to serve the larger community is raised. See *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190, 2 RR 2d 1901 (1965), reconsideration denied 2 FCC 2d 866, 6 RR 2d 1908 (1966). From WNAR's transmitter site the *present* 5 mv/m contour extends in the direction of Philadelphia a distance of 8 miles, penetrates the northwestern city limit 3 miles and encompasses 117,000 persons in Philadelphia representing 5.8% of the population. As previously indicated, the directional antenna system for the proposed power increase to 5 kilowatts and 1 kilowatt will radiate *maximum* energy through the *center* of Philadelphia. The proposed 5 mv/m contour under the 1 kilowatt operation would extend in the direction

[3] As discussed in paragraph 2, *supra*, when the Board substituted WNAR for Norcom, it stated that the new applicant should have the opportunity to demonstrate that it has met its burden under the Suburban Community issue. The Broadcast Bureau, in its brief, appears to interpret this directive as meaning that WNAR must, on the production of its own evidence, satisfy its burden under this issue. However, the Board, in agreement with WNAR, does not interpret our prior statement so strictly; it was intended that WNAR have the choice, at its own risk, to meet the specified issue either by the evidence introduced by Norcom at the first hearing, or by its own documentation. We do not agree with the Bureau that *Lebanon Valley Radio*, 11 FCC 2d 31, 11 RR 2d 998 (1967), is applicable to this situation. The *Lebanon* case involved competing applicants while the present case involves a transferee of an already existing station whose transferor had presented evidence in support of the proposal at an earlier hearing. In the latter situation, we believe the transferee may rely, though perhaps not successfully, on the presentation of the transferor. However, to the extent that WNAR has changed the proposal of Norcom, it cannot rely on its predecessor's showing. In this regard, see paragraph 11, *infra*.

[4] It will operate at 1 kilowatt during critical hours, with the same shape directional pattern for both the 5 kilowatt and the 1 kilowatt operations.

[5] Unless otherwise stated, all population data is based on 1960 U.S. Census figures.

of Philadelphia 13.5 miles and penetrate the city about 8 miles to encompass 446,000 persons in Philadelphia representing an increase of 329,000 persons. The proposed 5 mv/m contour under the 5 kilowatt operation would extend to a maximum distance of 19 miles and encompass the far city limits of Philadelphia southeast of the site. This contour, which will include all of Philadelphia except for a sector in the northeast part of the city, encompasses 1,845,326 persons constituting an increase of 1,728,326 persons in coverage to Philadelphia. The proposed 5 kilowatt operation will increase the 5 mv/m coverage of Philadelphia from 5.8% to 92.1% of the population—an increase of 86.3%.[6] The other statistics relating to WNAR's gains in service to the Philadelphia area are equally impressive.

6. WNAR's present and proposed service (2 mv/m) to the Philadelphia Urbanized Area (population 3,635,228), in which Norristown is located, are as follows:

	Population	Percent	Area	Percent
Present (500 w)	1,008,118	29.7	170.5	28
Proposed (1 kw)	2,868,122	79.0	322.5	53
Proposed (5 kw)	3,556,566	98.0	544.0	90

The city of Philadelphia accounts for 2,002,512 of the 3,635,228 persons in the Philadelphia Urbanized Area. WNAR's present and proposed service (2 mv/m) to Philadelphia is as follows:

	Population	Area	Percent
Present (500 w)	507,000	32.1	25.3
Proposed (1 kw)	1,940,000	123.0	97.0
Proposed (5 kw)	2,002,512	127.0	100.0

This represents a gain of primary service to about 75 percent of the population of Philadelphia. The population gain in Philadelphia represents about 57% of the 5 kw net gain.[7]

7. The present 500 watt operation provides a service to 482,774 persons in the home county of Montgomery (population 516,682). The proposed operation will result in a *loss* of service to WNAR's home county, as shown by the following figures:

1 kw service	451,857.	5 kw service	472,416.
1 kw loss	30,917.	5 kw loss	10,358.
1 kw gain	None.	5 kw gain	None.

[6] The proposed WNAR operation does not meet the technical requirements of Rules 73.30, 73.31 and 73.188(b) (1) and (2) for a station licensed to Philadelphia. The 5 mv/m contour does not cover all of the city and the 25 mv/m contour does not cover the principal business district.

[7] For a more extensive analysis of the population data and services available per county, see the Initial Decision, paragraphs 16–21.

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Thus, a significant number of persons in Montgomery County will lose a local county service.[8] In concluding the discussion of the engineering factors in this case, the Board would summarize its findings concerning the proposed power increase as follows: (a) 5 mv/m coverage of Philadelphia's population would be increased from about 6% to approximately 92%; (b) no additional service will accrue to the applicant's specified station location or to its home county; (c) a net *loss* of local service to a significant number of persons in the applicant's home county will occur; (d) maximum power will be radiated toward the city of Philadelphia, and service to that city (2 mv/m) will increase from 25% to 100%—total coverage of the city; (e) coverage of the Philadelphia Urbanized Area (2 mv/m) will increase from 28% to 90%; and (f) no lack of other broadcast services to Philadelphia has been shown. It is well established that "the engineering characteristics of a particular proposal affect the quantum of proof necessary to satisfy the standard as it is applied in a given situation. . . ." *Lebanon Valley Radio, Inc.*, 35 FCC 2d 243, 24 RR 2d 586 (1972), rev. den. FCC 73–226, released March 6, 1973. See also *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d 749, 23 RR 2d 760 (1972), rev. den. FCC 73–85, released January 30, 1973; *Kittyhawk Broadcasting Corp.*, 20 FCC 2d 1011, 18 RR 2d 125 (1970), rev. den. FCC 70–891, released August 26, 1970. Considering the undisputed facts, we are of the view that a heavy burden must be imposed on WNAR,[9] and, unless WNAR presents very compelling reasons to the contrary under the subissues, it would be impossible for the Board to conclude that the proposed operation is anything other than an ill-disguised attempt by WNAR to become a substandard Philadelphia station at the expense of its current service area.

8. *Subissues.* The Initial Decision in this case was not organized in terms of the subissues set out in paragraph 1, *supra*. Instead, the Presiding Judge relied primarily on his own criteria, *i.e.*, (1) transmitter location, (2) power, (3) mode of operation, and (4) coverage and population to be served. Although the Board considers these factors relevant (see paragraph 7, *supra*), we cannot overlook the fact that the Commission has set out, in its designation Order, paragraph 1, *supra*, specific subissues to be utilized in determining whether an applicant has overcome the 307(b) presumption of service to the larger community.[10] Thus, the question of whether an applicant has

[8] As the Board has stated: "[A]ny deprivation or degradation of [broadcast] service to any group of people is *prima facie* not in the public interest and can be justified only by countervailing public interest factors sufficient to offset that deprivation or degradation." *Central Coast Television (KCOY–TV)*, 14 FCC 2d 985, 986, 14 RR 2d 575, 579 (1968), review denied FCC 69–614, released June 4, 1969, reconsideration denied 16 RR 2d 960, appeal dismissed U.S. App. D.C. Case No. 23,422, August 19, 1971. See *Television Corporation of Michigan* v. *FCC*, 111 U.S. App. D.C. 101, 294 F.2d 730, 21 RR 2107 (1961). This principle applies with equal force to standard broadcast stations. *Cf. Fred Kaysbier*, 20 RR 2d 844 (1970). Further, it is not clear from the record if the two other AM stations located in the county adequately cover the proposed loss area. Thus, a grant of this proposal may result in a significant number of persons losing their only local county service.

[9] The fact that WNAR could not improve service to the north because of interference considerations does not substantially lessen the applicant's burden. *Cf. Lebanon Valley Radio, Inc., supra.*

[10] These are the standard subissues designated in Suburban Community cases. See, *e.g., Tri-State Broadcasting Co., Inc. (KUPD)*, 19 FCC 2d 1042, 17 RR 2d 689 (1969), review denied FCC 70–14, released February 13, 1970; *Naugatuck Valley Service, Inc.*, 8 FCC 2d 755, 10 RR 2d 737 (1967), affirmed *sub nom. Northeast Broadcasting, Inc.* v. *FCC*, 130 U.S. App. D.C. 278,400 F.2d 749, 13 RR 2d 2102 (1968); *Creek County Broadcasting Co.*, 31 FCC 2d 462, 22 RR 2d 891 (1971).

met its burden is primarily determined from the evidence adduced under the subissues. Therefore, the Board's analysis will be framed in terms of these subissues.

9. Under the issue of the specified community's separate and distinct programming needs, the applicant submitted an analysis of Norristown and Montgomery County.[11] The information submitted on Norristown is typical of most suburban communities.[12] The area possesses its own government, schools, retail establishments, etc. However, as the Commission has said: ". . . since virtually all suburban communities have their own political, civic and social institutions and since many of them have a substantial population and an economic vitality independent from the central city . . .", a showing that the suburb in question is a separate entity from the city is not sufficient to resolve the issue. *Monroeville Broadcasting Company*, 12 FCC 2d 359, 360, 12 RR 2d 946, 948 (1968), affirmed *sub nom. Miners Broadcasting Co.* v. *FCC*, 15 RR 2d 2080 (D.C. Cir. 1969). The requirements for meeting this issue have been clearly set out in past cases. An applicant must *compare* the specified station location with the larger city and translate the differences so discovered into separate and distinct programming needs. See *P.A.L. Broadcasters, Inc.*, FCC 73R-160, —— FCC 2d ——, released April 18, 1973; *Lebanon Valley Radio, Inc., supra; Monroeville Broadcasting Company, supra; Tri-State Broadcasting Co., Inc. (KUPD), supra.* The applicant has completely failed to make such a showing. Therefore, in light of the applicant's mere recitation of numerous descriptive facts concerning Norristown and Montgomery County, the Board concludes that WNAR has not met its burden under this issue as required by the relevant case law.

10. WNAR did not establish the extent to which the needs of the specified station location[13] are being met by existing standard broadcast stations. WNAR not only failed to show what programming was being provided by the stations serving Norristown, but did not even list these stations.[14] While there are at least five Philadelphia stations serving Norristown, WNAR made no attempt to determine the extent to which the needs of the proposed service area are being met by them. Applicant argues that its ascertainment survey made under the specified *Suburban* issue carries with it the presumption that the ascertained needs are unsatisfied. As WNAR states in its reply to the Bureau's exceptions:

> The ascertainment of problems and needs by discussions with civic leaders and members of the public carries with it the presumption that these needs are unsatisfied and need further radio attention. But not required is a detailed analysis of every other radio service.

[11] WNAR also describes the composition of other towns in the area.

[12] WNAR's own submissions indicate that Norristown is a suburb of Philadelphia, with many residents of Norristown commuting daily to the city.

[13] The Broadcast Bureau consistently asserts that findings and conclusions should be made with regard to the "gain area"; however, we agree with the applicant that these subissues read "specified station location", and, therefore, Norristown is the location involved.

[14] The following Philadelphia stations serve all of the present and proposed service areas of WNAR: WFIL (560 kHz, 5 kw-DA); WIP (610 kHz, 5 kw-DA); WTEL (860 kHz, 10 kw-DA); KYW (1060 kHz, 50 kw-DA); and WCAU (1210 kHz, 50 kw-ND). See WNAR Exhibit 17, Figure VII, page 2. The record does not show the extent of the service areas of the two other Montgomery County stations: WNPV, Lansdale, Pennsylvania (1440 kHz, 0.5 kw-DA) and WPAZ, Pottstown, Pennsylvania (1370 kHz, 1 kw-ND).

11. The position of WNAR (which has the burden of proof on this issue) that it is free to disregard the Commission's determination of what is required by this issue is clearly contrary to the *Policy Statement*, *supra*, and the relevant case law. The usual procedure for applicants faced with this issue is to send interrogatories to the other stations in the area eliciting information on the programming directed to the applicant's specified station location. See *Harry D. Stephenson and Robert E. Stephenson*, *supra*. Although the actual taking of such depositions is not specifically required, the showing of the extent of service by existing AM stations must be "reasonably concrete and particularized". *Kittyhawk Broadcasting Corporation*, *supra*, 20 FCC 2d at 1018. WNAR's "presumption" concerning this service based on its *Suburban* surveys is totally inadequate.[15] Without facts about programming available to the area, it is impossible for the Board to make a reasoned analysis of whether WNAR's programming will meet specific programming needs of the station location that are unsatisfied at present. Such an inquiry clearly goes beyond the scope of a *Suburban* issue.[16] Again, WNAR's arguments that Norristown is a distinct community in which the station has operated for twenty years, that the station's past programming was devoted to Norristown and Montgomery County and that it would not be possible for it to compete with the large and powerful Philadelphia stations are not responsive to the issue as designated by the Commission. Moreover, while the applicant has shown that Station WNAR has, in the past, devoted considerable time to promoting local activities, such programming showing is clearly insufficient to meet the separate, distinct, and unsatisfied tests of a Suburban Community issue. Finally, WNAR has substantially changed the programming from that presented in the past and proposed by Norcom. Thus, the Board concludes that WNAR has failed to carry its burden on this issue.

12. WNAR's showing of the sources of its advertising revenues is not sufficiently informative. The exhibits originally submitted by Norcom are a number of years out of date and have not been materially supplemented by WNAR. For the years 1965 and 1966, they show the station having a net operating income in excess of $50,000; however, the station lost money after the change in ownership. The total advertising revenues were well in excess of $200,000 for 1965 and 1966 with an average, according to WNAR, of 75% of the revenues accounted for by "local" sales. However, a breakdown of these local sales

[15] In this connection, we note that, although the applicant urges that the Suburban Community issue should be resolved in terms of its specified station location and that the Bureau's assertions concerning the relevance of the gain area are erroneous, the *Suburban* issue specified by the Board concerns the gain area, not the specified station location, and the details of the applicant's showing relate primarily to the gain area.

[16] The *Suburban* policy was designed to insure "that potential licensees make thorough efforts to ascertain the problems of their communities and that they formulate programming responsive to those needs." *Radio Clinton, Inc.*, FCC 73-463, released May 11, 1973. The identification of a community problem does not necessarily indicate that no other station has formulated programming to deal with it. For example, in a given community water pollution may be a problem, and that problem does not appear or disappear depending on whether or not an existing radio station has programs bearing on it. The community problem is not met until the pollution is eliminated. *Suburban* looks toward identifying such problems; *Suburban Community* goes beyond this and looks toward identifying problems that are different from problems in the nearby larger community and are not being treated by programming from existing stations. Such an additional showing is essential to a solution of the allocation question to which the *Suburban Community* policy addresses itself, and the findings made on the basis of such evidence are some of the indicators by which the Commission is able to decide whether an applicant is proposing a realistic local transmission service for its specified station location rather than for the larger nearby city.

for March, 1966, and May, 1967, indicates that these revenues originated in many towns and cities other than Norristown, and no figures are given for Norristown itself. Since the issue under consideration here is phrased in terms of the revenues generated by the "specified station location", which is Norristown, the Board is unable to conclude that the revenues from Norristown sources are adequate to support the proposal.[17]

13. *Conclusion.* In its brief, WNAR states: "The only real question is whether WNAR has demonstrated a reasonable basis for improving its service to this suburban area." We find this misstatement typical of WNAR's inadequate presentation: it *must* demonstrate more than a reasonable basis for improving its signal; it *must* satisfy the specific burdens set forth in the designation Order. It did not carry its burden on any of the subissues: (a) it failed to compare the two communities involved and translate the results into meaningful programming needs for the specified station location; (b) it simply refused to ascertain or analyze the programming of other standard broadcast stations in the area concerning their service to Norristown; (c) it failed to show unsatisfied needs of its station location other than by arguing that these needs should be presumed from Norristown's status as an independent community and the applicant's Suburban showing; and (d) its showing on its advertising revenues provided no figures on revenues from Norristown. Such a total failure to rebut the Suburban Community presumption of service to Philadelphia is inexcusable since the engineering showing in this case indicates that the applicant will gain total coverage of Philadelphia at the cost of service to its home county. In spite of assertions to the contrary, these factors compel the conclusion that WNAR has not rebutted the presumption that it will become a substandard Philadelphia station to the detriment of its specified station location in violation of the Commission's Suburban Community policy. Therefore, the Board concludes that the public interest, convenience and necessity would not be served by a grant of the subject application.

14. Accordingly, IT IS ORDERED, That the application of WNAR, Inc. (BP–12902) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
DONALD J. BERKEMEYER, *Member, Review Board.*

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[17] WNAR also argues that *Naugatuck Valley Service, Inc.*, 8 FCC 2d 755, 10 RR 2d 737 (1967), affirmed *sub nom. Northeast Broadcasting, Inc.* v. *FCC*, 130 U.S. App. D.C. 278, 400 F.2d 749, 13 RR 2d 2102 (1968), is precedent for a grant of its application. A very brief comparison of the two cases will serve to illustrate the fallacy of this argument and will, in fact, further illustrate the deficiency in WNAR's showing. In *Naugatuck*, there was only a minimal increase in service to the larger city; while in the present case WNAR's 2 mv/m service will go from 25 percent to *total* coverage of Philadelphia. Thus, WNAR has a much heavier burden of proof to overcome the presumption of service to the larger city. However, where the *Naugatuck* applicant made a detailed showing on each issue, WNAR made consistently poor attempts to meet the issues. Finally, the *Naugatuck* applicant's proposal provided service to white and gray areas, while WNAR's proposal will result in a loss of service to his home county. Thus, *Naugatuck* clearly illustrates the deficiencies in WNAR's showing.

APPENDIX

Rulings on Exceptions of the Broadcast Bureau

Exception No.	*Ruling*
1(1)-(12)[1]	*Granted* in substance. These exceptions relate primarily to changes in programming plans and policies made by WNAR. As indicated in footnote 3 of the Decision, to the extent that WNAR has changed the proposal of Norcom, it cannot rely on the showing of its predecessor.
1 (12), (13), 14	*Granted* in substance. See paragraphs 11 and 12 of this Decision.
2, 3	*Granted.* Calculated values of radiation should be used for purposes of determining coverage. See *Salem Broadcasting Co., Inc.*, 38 FCC 2d 170, 174, 25 RR 2d 955, 961 (1972).
4	*Denied.* The record is clear (WNAR Ex. No. 17A) as to the basis for the difference in the Bureau's figure and the Initial Decision figure for the present interference-free area. In the circumstances of this case, the difference is not of decisional significance.
5, 8	*Granted* to the extent indicated below. The Bureau's findings for this paragraph are more comprehensive than those in paragraph 20 of the Initial Decision. However, some of the Bureau's figures are not accurate, and their data, therefore, is corrected in the following: "The change in facilities to 5 kilowatts would permit WNAR to provide a new service to 2,626,269 persons in 2,414 square miles including (a) 2,548,698 persons in the Philadelphia urbanized area of which 1,495,512 persons reside in Philadelphia; (b) 7,697 persons in the Wilmington, Delaware urbanized area; (c) 8,121 persons in other urban places; and (d) 61,753 persons in rural areas. Coverage of Philadelphia would be increased from the present 507,000 persons to all the population therein. The service loss would affect 22,963 persons in 106 square miles including 12,195 persons in urban places exclusive of the Philadelphia urbanized area and 10,768 persons in rural areas. A net gain of 2,603,306 persons and 2,308 square miles would accrue to WNAR under the proposed 5 kilowatt operation. The population proposed to be served in Philadelphia constitutes 51% of the total population within the proposed service area. The gain in population within Philadelphia represents 57% of the net gain in population. "The change to a 1 kilowatt operation during critical hours would enable WNAR to provide a new primary service in an area of 1,027 square miles including 1,880,923 persons composed of 1,861,535 persons in the Philadelphia urbanized area (of which 1,433,000 persons reside in Philadelphia), 812 persons in urban places not part of the Philadelphia urbanized area, and 18,576 persons in rural areas. The service loss would affect 1,501 persons in the Philadelphia urbanized area, 33,469 persons in other urban places and 47,170 persons in rural areas. A net gain of 1,798,783 persons and 577 square miles would accrue to WNAR under the proposed 1 kilowatt operation. The population proposed to be served in Philadelphia represents 62% of the total population within the proposed service area."

[1] Exception No. 1 is divided into 13 subparts.

Exception No.	*Ruling*
6	*Denied.* The Bureau's requested findings which, *inter alia*, refer to "undisclosed" radiation limits, do not contain sufficient detail to be of decisional significance.
7	*Granted.*
9, 11, 12	*Granted.* However, the sentences referred to in exception 9 are in error. Therefore, the fifth and sixth sentences, and the seventh through ninth sentences of paragraph 16, the last two sentences of paragraph 17 and the entire paragraph 18 of the conclusions of the Initial Decision are deleted as not supported by the record or irrelevant.
10, 13, 16, 17	*Granted* for the reasons contained in the whole of this Decision.
15	*Granted* in substance with the figure "30,913" corrected to read "30,917".

DISSENTING STATEMENT OF BOARD MEMBER SYLVIA D. KESSLER

On the basis of the Board's Order (FCC 73R–125), released March 23, 1973, in the *Greensburg* case (Docket No. 18868), certifying that case to the Commission, it is my view that the subject *Norristown* case should, likewise, be certified to the Commission. The subject proceeding again brings into play (a) the Court's call [1] for clarification of the *Surburban Community* issues, *viz.*, the type and degree of evidence; and (b) the irreconcilable conflicts of views not only among applicants but also among the Commission's own staff, *i.e.*, its Broadcast Bureau, members of this Board, and Administrative Law Judges. Since my views are set forth in detail in the Board's Order in *Greensburg*, *supra*, in my separate concurring opinion in *Greensburg*,[2] and in my dissenting statement in *St. Cross Broadcasting, Inc.*[3] (FCC 73R–95), released March 5, 1973, these documents are incorporated herein by reference. Briefly summarized, it has been my position that there is not only a need for clarification as to the type and degree of evidence required with respect to the *Suburban Community* issues, but there is also a need for the Commission to re-examine the *Suburban Community Policy Statement*[4] and the issues in the light of the developments which have occurred in the 8-year period since the enactment of the *Policy Statement*, with particular regard to the interrelationship of the *Primer on Community Ascertainment*.[5]

The majority of the Board here has attempted at Footnote 16 to deal with my position concerning the interrelationship of the *Primer*. They state:

> The identification of a community problem does not necessarily indicate that no other station has formulated programming to deal with it. For example, in a given community water pollution may be a problem, and that problem does not appear or disappear depending on whether or not an existing radio station has programs bearing on it. The community problem is not met until the pollution is eliminated. Suburban looks toward identifying such problems. *Suburban Community* goes beyond this and looks toward identifying problems that are different from problems in the nearby larger community and are not being treated by programming from existing stations.

[1] *Northern Indiana Broadcasters, Inc.* v. *FCC*, 148 U.S. App. D.C. 327, 459 F.2d 1351, 23 RR 2d 2113 (1972).
[2] See the Board's Decision (FCC 73R–53), released February 2, 1973, and subsequently set aside by the Board's subsequent Order, *supra*.
[3] In *St. Cross*, *supra*, I objected to further specification of *Suburban Community* issues by the Board pending Commission clarification, as wasteful of the hearing processes in view of the existing confusion over the meaning of those issues.
[4] 2 FCC 2d 190 (1965).
[5] 27 FCC 2d 650 (1971).

In my view the majority's explanation of the difference between Suburban and *Suburban Community* is simplistic. First, it ignores the crucial factor, *i.e.*, how different do suburban community problems have to be for purposes of rebutting the big city presumption. Secondly, it ignores the fact that suburban communities have not been exempted from nationwide types of community problems; nor regional types. Thirdly, it ignores the fact that the *Primer* requires *all* applicants to search out *all* significant problems. Without question, even under the *Primer*—without regard to the *Suburban Community* policy—a suburban applicant is now required (a) to submit demographic data concerning the characteristics of the suburban community and its population; (b) to search out and to define its *own* inimitable community problems; (c) to establish a dialogue with its *own* community leaders; and (d) to establish that it has accepted its public responsibility role to the suburban community "to meet, aid in meeting, be responsive to, or stimulate the solution for [its own] community problems." See Q. & A. 3 of the *Primer*. These types of data were not required routinely in 1965 when the Commission adopted its *Suburban Community Policy*. In light of these new *Primer* requirements, I believe a serious question is presented concerning the regulatory objective or justification for the continuation of the great burden imposed on suburban applicants which requires them to show, under the *Suburban Community* issues, that no station in the big city is catering significantly to a suburban community's national or regional type problems, or even to some of its own inimitable community problems. *Cf.* paras. 10 and 57–59 of the *Primer* relating to "what problems should be treated by the applicant," and to a licensee's secondary programming obligation to communities outside of its principal city.

An observation is also pertinent with respect to the Broadcast Bureau's position that under the *Suburban Community* issues an applicant is required to make its showing in the context of the term "programming needs", unlike the *Primer* and the Suburban issue which speak in terms of "community problems." Again, it is my view that this is a simplistic position. It ignores the origin of the term "programming needs" in the *Suburban Community* issues, which was derived from the context of the Commission's prior Suburban issue.[6] In 1965, both types of issues were geared to "programming needs." However, with the advent of the *Primer*, the Commission modified the Suburban issue to comport with its discussion at para. 19 of the *Primer*, and since then the standard has been "community problems, needs, and interest", and not programming needs. Although the Commission has not, likewise, modified *Suburban Community* issues to comport with the new standard, *i.e.*, community problems, it seems to me that this has resulted from an oversight because I can find no justification for placement of this additional burden on a suburban applicant in light of the new *Primer* requirements discussed above.

[6] For a detailed discussion of the history of the Suburban issue geared to its language, see note 2 of my separate dissenting statement to the Board's Decision in the *Kutztown* case, 38 FCC 1374 (1965), at 38 FCC 1390; reversed, in part, 4 FCC 2d 150 (1966).

F.C.C. 68D–35

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of NORRISTOWN BROADCASTING CO., INC. (WNAR), NORRISTOWN, PA. For Construction Permit	Docket No. 14952 File No. BP–12902

APPEARANCES

Ben C. Fisher, on behalf of Norristown Broadcasting Company, Inc.; and *John B. Letterman*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER BASIL P. COOPER

(Issued May 9, 1968; Released May 13, 1968)

PRELIMINARY STATEMENT

1. In this proceeding, Norristown Broadcasting Company, Inc., licensee of Class II Station WNAR, 1110 kc, 500 watts, nondirectional, daytime only, at Norristown, Pennsylvania, seeks a construction permit to increase power to 5 kw, 1 kw during critical hours, with a directional mode of operation.

2. The Commission, by Memorandum Opinion and Order adopted February 8, 1967, released February 16, 1967, found the applicant to be qualified to operate as proposed but designated the application for hearing on the following issues:

1. To determine the areas and populations which would receive service from the proposed operation of the applicant and availability of other primary service to such areas and populations.

2. To determine whether the proposal of Norristown Broadcasting Company, Inc. will realistically provide a local transmission facility for its specified station location or for another larger community, in the light of all the relevant evidence, including, but not necessarily limited to, the showing with respect to:

(a) The extent to which the specified station location has been ascertained by the applicant to have separate and distinct programming needs;

(b) The extent to which the needs of the specified station location are being met by existing standard broadcast stations;

(c) The extent to which the applicant's program proposal will meet the specific unsatisfied programming needs of its specified station location; and

(d) The extent to which the projected sources of the applicant's advertising revenues within its specified station location are adequate to support its proposal, as compared with its projected sources from all other areas.

3. To determine, in the event that it is concluded pursuant to the foregoing issue (a) that the proposal of the applicant will not realistically provide a local transmission service for its specified station location, whether such proposal meets all of the technical provisions of the Rules, including Sections 73.30, 73.31, and 73.188(b)(1) and (2) for standard broadcast stations assigned to the most populous community for which it is determined that the proposal will realistically provide a local transmission service, namely Philadelphia, Pennsylvania.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience and necessity.

3. The Commission ordered that in the event of a grant of the application, the construction permit shall include the following condition:

Subsequent to the installation and adjustment of the daytime directional antenna system and prior to the authorization of program tests, sufficient field intensity measurement data shall be made on the nighttime directional antenna system to establish that the nighttime radiation pattern remains adjusted within authorized limits.

The inclusion of this condition is believed to have been an error as the applicant does not propose any nighttime operation, hence proposes no nighttime directional antenna system.

4. A prehearing conference was held on March 17, 1967, and the evidentiary hearing was held on September 11 and October 6, 1967. The record was closed by a formal order (FCC 67M–1954), issued November 20, 1967, released November 21, 1967. Proposed findings of fact and conclusions of law were filed by the applicant and the Broadcast Bureau on January 12, 1968, and reply findings were filed by the applicant on January 22, 1968.

5. All population figures used herein reflect those of the official 1960 U.S. Census except where reference is made to earlier U.S. Census figures. The pertinent service contours of the station involved were established in accordance with the standards of good engineering practice. Population figures were determined by breaking areas down by minor civil divisions. Urban areas were not deemed to receive primary service unless the signal intensity thereto was 2 mv/m or better.

FINDINGS OF FACT

6. The borough of Norristown (population 38,925) is the county seat and largest community in Montgomery County (population 516,682), Pennsylvania. The southernmost part of the boundary of Norristown is approximately 4.5 miles northwest of the nearest boundary of the city of Philadelphia. The center of Norristown is approximately 16 miles from the center of the Philadelphia main business district. Portions of the urbanized area of Montgomery County serve as a buffer between Norristown and Philadelphia.

7, Montgomery County is an irregularly-shaped county which is bordered on the south and southeast by Philadelphia County (which is coterminous with the city of Philadelphia), on the southwest by Delaware County, on the west by Chester County, on the northwest by Berks County, on the north by Lehigh County, and on the northeast by Bucks County.

8. The areas and populations of Norristown and of the adjoining Pennsylvania counties as well as the area and population of the Philadelphia urbanized area are as follows:

Place	Area (square miles)	Population	
		Total	Philadelphia urbanized area
Norristown	3.5	38,925	38,925
Montgomery County	491.0	516,682	353,958
Philadelphia [1]	127.0	2,002,512	2,002,512
Philadelphia urbanized area	597.0	3,635,228	3,635,228
Berks County	864.0	275,414	(2)
Bucks County	617.0	308,567	198,978
Chester County	760.0	210,608	26,993
Delaware County	185.0	553,154	530,792
Lehigh County	347.0	227,536	(2)

[1] Philadelphia City and County are identical.
[2] None.

9. The transmitter of Station WNAR is approximately 0.7 mile east of the eastern boundary of Norristown and approximately 5 miles northwest of the nearest boundary of the city of Philadelphia. Using the computed antenna radiation of 135 mv/m for Station WNAR, the 0.5 mv/m contour of Station WNAR extends approximately 24 miles in all directions from the transmitter site. Due, however, to the fact that Station WGPA, Bethlehem, Pennsylvania, operates on the frequency 1100 kc with 250 watts power, the service area of WNAR is limited to a distance of 18 miles to the north. Station WNAR now serves 94% of the population of Montgomery County and all of the land area except a small triangular area lying to the north of the WNAR transmitter. The WNAR service contours also cover parts of the city of Philadelphia and Bucks County, Delaware County, Chester County and Berks County, all in Pennsylvania; Burlington County, Camden County and Gloucester County, all in New Jersey; and a small part of New Castle County, Delaware.

10. WNAR proposes to operate from its present site using a three-tower directional array designed to limit radiation to the north in the direction of Station WGPA, 1100 kc, 250 watts, Bethlehem, Pennsylvania, and Station WKAP, 1320 kc, 5 kw–LS, 1 kw–N, U, DA–2, Allentown, Pennsylvania, under common control with the applicant, to a computed 125 mv/m with an MEOV of 130 mv/m. The proposed antenna system is designed to generate similar pear-shaped radiation patterns for both the 5 kw and 1 kw operations, the only difference being less radiation when operating with power of 1 kw during the critical hours. The main radiation lobe is directed to the southeast toward Philadelphia. For 5 kw operation, the maximum radiation obtains a value of 744 mv/m along a bearing to the southeast passing through the center of Philadelphia. This value will be reduced to 333 mv/m during critical hours when the station's operating power is limited to 1 kw.

11. Based on the calculated radiation to the north of 125 mv/m with an MEOV of 130 mv/m, the service area of Station WNAR will fall two miles and one mile, respectively, short of the present WNAR northern service contour based on its present radiated power of 135 mv/m in all directions. Operating with power of 1 kw during critical hours, the WNAR service contour is calculated to fall approximately four miles short of its present northern service contour. As

Station WNAR may radiate power to the north up to 135 mv/m without causing additional objectionable interference to Station WGPA, Bethlehem, Pennsylvania, it will be seen that when the WNAR directional array is finally adjusted the loss of service to the north may be substantially less than the loss based on the calculated radiated power of 125 mv/m in this direction. It should also be kept in mind that as the radiated power of Station WNAR, 1110 kc, to the north is reduced, the service area of Station WGPA, operating on 1100 kc at Bethlehem, Pennsylvania, will be extended to the south. Stated differently, there will be a substitution of service in the area involved as the area "lost" to Station WNAR will be "gained" by Station WGPA.

12. Operating with power of 5 kw, the WNAR service area will be extended to the south and southeast approximately 27 miles beyond its present service contour and reach a maximum distance of 51 miles from the transmitter site. Operating during critical hours with power of 1 kw, the WNAR service area will extend as much as 14 miles beyond its service contour and reach a maximum distance of 38 miles from the WNAR transmitter site.

13. Based on the calculated radiation of 125 mv/m to the north toward Station WGPA, Bethlehem, Pennsylvania, the granting of the WNAR application will affect areas and populations as follows:

Contour	Present 500 w		Proposed 5 kw		Proposed 1 kw	
	Area (square miles)	Population	Area (square miles)	Population	Area (square miles)	Population
WNAR:						
5 mv/m	211	389,893	529	2,725,354	265	931,354
2 mv/m	530	1,091,594	1,205	3,704,741	619	2,621,110
0.5 mv/m	1,840	1,328,911	4,089	3,931,267	2,138	3,114,541
Interference from WGPA	134	19,893	119	19,943	22	6,740
Interference-free	1,706	1,309,018	3,856	3,912,324	2,116	3,107,801
WGPA, Bethlehem:						
WGPA 0.5 mv/m	1,472	530,432	1,472	530,432	1,472	530,432
Interference from WNAR	134	25,886	125	24,338	35	5,438
Interference-free WGPA	1,338	494,546	1,347	506,094	1,437	524,994

14. The WNAR present 5 mv/m contour extends in the direction of Philadelphia for a distance of approximately eight miles and penetrates the northwestern part of the city of Philadelphia approximately three miles encompassing 117,000 persons, representing 5.8% of the population of that city. Operating as proposed with power of 5 kw, the 5 mv/m contour will encompass all of the city of Philadelphia except a small semicircular area lying to the extreme northeastern portion of that city, with the result that the proposed 5 mv/m contour will encompass 1,845,326 persons or 92.1% of the population of the city of Philadelphia. During critical hours when operating with 1 kw power, the 5 mv/m contour will encompass 446,000 persons representing 22.2% of the population of this city.

15. Operating as proposed with power of 5 kw, the 25 mv/m contour will penetrate the city of Philadelphia for approximately 3.5 miles, but will not encompass any of the main business district of that city. The

proposed 10 mv/m contour falls short of the main Philadelphia business district by a fraction of a mile.

16. The granting of the WNAR application would affect populations in Montgomery County and the Pennsylvania counties which are a part of the Philadelphia urbanized area as follows:

County	Present service	Percent [1]	Gain	Percent [1]	Loss	Percent [1]
			Proposed 1 kw			
Montgomery	482,774	94.0			30,917	6.0
Philadelphia	507,000	25.3	1,433,000	71.6		
Berks	6,316	2.3			6,316	2.3
Bucks	71,550	23.2			15,312	5.0
Chester	88,086	41.8			22,408	10.6
Delaware	129,086	23.3	383,543	69.3		
			Proposed 5 kw			
Montgomery	482,774	94.0			10,358	2.0
Philadelphia	507,000	25.3	1,495,512	74.7		
Berks	6,316	2.3			4,644	1.7
Bucks	71,550	23.2	114,087	3.7		
Chester	88,086	41.8	19,200	9.1		
Delaware	129,086	23.3	424,068	76.7		

[1] Percentage of the population in the pertinent county.

17. Other standard broadcast stations authorized to serve Pennsylvania counties which are a part of the Philadelphia urbanized area are as follows:

	Call	Facilities
Montgomery County:		
Lansdale	WNPV	1440 kc, 0.5 kw, DA-D.
Pottstown	WPAZ	1370 kc, 1 kw-D.
Delaware County:		
Chester	WEEZ	1590 kc, 1 kw, DA-N.
	WVCH	740 kc, 1 kw-D.
Coatsville	WCOJ	1420 kc, 5 kw, DA-N.
Media	WXUR	690 kc, 0.5 kw, DA-D.
Chester County: West Chester	WCHE	1520 kc, 0.25 kw, D.
Bucks County:		
Doylestown	WBUX	1570 kc, 5 kw, DA-D.
Levittown-Fairless Hills	WBCB	1490 kc, 1 kw-D/0.25 kw-N.
Philadelphia County: Philadelphia	KYW [1]	1060 kc, 50 kw, DA-U.
	WDAS	1480 kc, 5 kw-D/1 kw-N, DA-2.
	WFIL [1]	560 kc, 5 kw, DA-2.
	WFLN	900 kc, 1 kw, DA-D.
	WHAT	1340 kc, 1 kw-D/0.25 kw-N.
	WIBG	990 kc, 50 kw-D/10 kw-N, DA-2.
	WIP [1]	610 kc, 5 kw, DA-1.
	WPEN	950 kc, 5 kw, DA-N.
	WRCP	1540 kc, 50 kw, DA-D.
	WTEL [1]	860 kc, 10 kw, DA-D.
	WCAU [1]	1210 kc, 50 kw, U.

[1] These stations serve all the present and proposed service areas of WNAR, including all losses and gains of service.

18. All of the city and county of Philadelphia receives service of 5 mv/m or better from Stations WFIL, WTEL, WPEN, WIBG, KYW, WCAU and WRCP, all in Philadelphia, whereas Stations WIP and WFLN, Philadelphia, and Station WKDN, Camden, New Jersey, serve between 75% and 100% of the city of Philadelphia.

19. Operating with power of 5 kw as proposed, the 2 mv/m contour

of Station WNAR will serve all of the city of Philadelphia. Stations WFIL, WIP, WTEL, WPEN, WIBG, KYW, WCAU, WDAS, WRCP, all in Philadelphia, and Station WKDN, Camden, New Jersey, serve all of Philadelphia with a signal of 2 mv/m or better whereas Stations WFLN, WHAT, both in Philadelphia, WVCH, Chester, Pennsylvania, WCAM, Camden, New Jersey, and WXUR, Media, Pennsylvania, serve between 75% and 100% of the population of the city of Philadelphia.

20. Three relatively small communities, Royersford (3,969 persons), Souderton (5,381 persons) and one-half (1,531 persons) of Spring City (3,062 persons), now receive service of 2 mv/m or better from Station WNAR but will not receive primary service with that station operating as proposed with 5 kw. The 10,581 persons living in cities of 2,500 persons or more who will lose service of 2 mv/m or better from Station WNAR now receive primary service from Stations WCAU, WFIL, WIP, WPEN, all in Philadelphia, and from WOR in New York City. The 104 square miles which will lose a rural signal contains a nonurban population of 19,870 persons. All of this area is served with a signal of 0.5 mv/m or better from Stations WFIL, WIP, WPEN, WRCP, WCAU, all in Philadelphia, WOR in New York City, and WVCH, Chester, Pennsylvania. Parts of the area also receive such service from Stations WBUX, Doylestown; WPAZ, Pottstown; WIBG, Philadelphia; and WABC, New York City. In addition, the area lost to Station WNAR will be gained by Station WGPA, Bethlehem (see paragraph 11, *supra*).

21. Statistical data relating to total populations that would gain or lose service under the present proposal by county and state are as follows:

State of Pennsylvania	Urbanized	Other Urban	Rural	Total
Montgomery County:				
Present	353,958	25,655	103,161	482,774
Proposed 1 kw	353,958	8,828	89,071	451,857
Gain 1 kw				
Loss 1 kw		16,827	14,090	30,917
Net loss 1 kw		8,828	14,090	30,917
Proposed 5 kw	353,958	16,305	103,153	472,416
Gain 5 kw				
Loss 5 kw		9,350	1,008	10,358
Net loss 5 kw		9,350	1,008	10,358
Philadelphia County:				
Present	507,000			507,000
Proposed 1 kw	1,940,000			1,940,000
Gain 1 kw	1,433,000			1,433,000
Proposed 5 kw	2,002,512			2,002,512
Gain 5 kw	1,495,512			1,495,512
Berks County:				
Present			6,316	6,316
Proposed 1 kw				
Gain 1 kw				
Net loss 1 kw			6,316	6,316
Proposed 5 kw			1,672	1,672
Gain 5 kw				
Net loss 5 kw			4,644	4,644
Bucks County:				
Present	14,947		56,603	71,550
Proposed 1 kw	18,956		37,282	56,238
Gain 1 kw	4,009			4,009
Loss 1 kw			19,321	19,321
Net loss 1 kw				15,312
Proposed 5 kw	130,891		54,746	185,637
Gain 5 kw	115,944			15,944
Loss 5 kw			1,857	1,857
Net gain 5 kw				114,087

State of Pennsylvania	Urbanized	Other Urban	Rural	Total
Chester County:				
Present	24,942	16,642	46,502	88,086
Proposed 1 kw	25,058		40,620	65,678
Gain 1 kw	1,617		1,561	3,178
Loss 1 kw	1,501	16,642	7,443	25,586
Net loss 1 kw	[1] 116	16,642	5,882	22,408
Proposed 5 kw	26,993	13,797	66,496	107,286
Gain 5 kw	2,051		23,263	25,394
Loss 5 kw		2,845	3,250	6,104
Net gain 5 kw	2,051	[2] 2,845	19,994	19,200
Delaware County:				
Present	107,271		21,815	129,086
Proposed 1 kw	490,267		22,362	512,629
Gain 1 kw	382,996		547	383,543
Loss 1 kw				
Net gain 1 kw	382,996		547	383,543
Proposed 5 kw	530,792		22,362	553,154
Gain 5 kw	423,521		547	424,068
Loss 5 kw				
Net gain 5 kw	423,521		547	424,068
State of New Jersey:				
Present			22,405	22,405
Proposed 1 kw	39,913	812	37,813	78,358
Gain 1 kw	39,913	812	15,408	56,133
Loss 1 kw				
Net gain 1 kw	39,913	812	15,408	56,133
Proposed 5 kw	511,670	8,121	45,559	565,350
Gain 5 kw	511,670	8,121	23,154	542,945
Loss 5 kw				
Net gain 5 kw	511,670	8,121	23,154	542,945
State of Delaware:				
Present			1,801	1,801
Proposed 1 kw			2,861	2,861
Gain 1 kw			1,060	1,060
Proposed 5 kw	7,697		16,573	24,270
Gain 5 kw	7,697		14,772	22,469
State of Maryland:				
Present				
Proposed 1 kw				
Proposed 5 kw	16,600		27	16,627
Gain 5 kw	16,600		27	16,627
Loss 5 kw				
Net gain 5 kw	16,600		27	16,627

[1] Net gain.
[2] Net loss.

NONTECHNICAL MATTERS

22. Three brothers, N. Joe Rahall, Sam G. Rahall and Farris E. Rahall, each own one-third of the stock of Norristown Broadcasting Company, Inc., licensee of Station WNAR. They, together with a local Norristown practicing attorney, constitute the officers and directors of this company. The Rahall brothers have owned Station WNAR since 1946. When the Commission relaxed its rules to permit Class II stations to increase daytime power as long as they did not increase the radiation toward the dominant Class I station on the channel, the Rahall brothers sought to improve the facilities of Station WNAR. As a result, they filed and prosecuted an application to increase the daytime power of Station WNAR to 50 kw using a nine-element directional array. This application was prosecuted through an evidentiary hearing and an Initial Decision looking toward the grant of such application was issued. After the issuance of the Initial Decision, however, the applicant concluded that the costs and difficulties involved in the proposed 50 kw operation were not warranted and, accordingly, amended the application and proposed operation in the manner previously outlined. Before reaching this decision, the applicant considered the fact that the 50 kw operation would not serve the four-county area

surrounding Philadelphia as well as the proposed operation and, accordingly, abandoned the idea of becoming a metropolitan station and intends to remain a station serving primarily Montgomery County and the suburban area contiguous thereto.

23. WNAR, Norristown, is one of three stations located in Montgomery County. The other stations are WNPV, 1440 kc, 0.5 kw, DA–D, Lansdale, approximately 10 miles north-northeast of Norristown, and WPAZ, 1370 kc, 1 kw-D, Pottstown, approximately 20 miles northwest of Norristown. To the east in Bucks County, the nearest stations are WBUX, 1570 kc, 5 kw, DA–D, Doylestown, approximately 15 miles northeast of Norristown, and WBCB, 1490 kc, 1 kw-D/0.25 kw-N, Levittown-Fairless Hills, approximately 22 miles east of Norristown. To the west of Montgomery County, in Chester County, is Station WCHE, 1520 kc, 0.25 kw, D, at West Chester, approximately 18 miles southwest of Norristown. To the southwest in Delaware County are located Stations WEEZ, 1590 kc, 1 kw, DA–N, and WVCH, 740 kc, 1 kw-D, both in Chester, and WCOJ, 1420 kc, 5 kw, DA–N, Coatsville, and WXUR, 690 kc, 0.5 kw, DA–D, Media.

24. The southern boundary of the borough of Norristown is approximately two miles north of the Pennsylvania Turnpike, approximately four miles northwest of where the Pennsylvania Turnpike joins the northeastern edge of said turnpike going in the direction of Allentown and Bethlehem, and approximately six miles northeast of the point where the Pennsylvania Turnpike joins the Schuylkill Expressway, a major expressway connecting the Pennsylvania Turnpike to the center of Pennsylvania and to the south towards the New Jersey Turnpike. Three railroads serve the city and borough of Norristown. In addition to the high speed limited access freeways, Norristown and the adjoining areas are served by a substantial number of improved highways.

25. The high speed limited access highways give Norristown ready access to the east to Brunswick and Newark, New Jersey, and to New York City, to the west to Pittsburgh, to the north to the Allentown-Bethlehem area, and to the south via the Schuylkill Expressway to Philadelphia and points in New Jersey.

26. The highway and rail facilities available to Norristown and adjoining area have played important parts in the economic and industrial development of recent years. Diversified manufacturing activities are to be found in the nearby communities of Bridgeport, King of Prussia, Valley Forge, Conshohocken, Ambler and Plymouth Meeting. The large suburban shopping centers at King of Prussia and Plymouth Meeting, in addition to retail services, offer movies, restaurants and other services and facilities which have made them social and civic centers attracting people from many miles.

27. Major industrial centers in Montgomery County include Norristown, King of Prussia, and Conshohocken. There are over 100 manufacturing establishments in central Montgomery County, including those of General Electric, Univac Division of Sperry Rand, Western Electric, B. F. Goodrich, Philco, Alan Wood Steel Company and Goodyear Tire Company. These major plants attract employees from throughout the Philadelphia metropolitan area. During the past 20 years, some of these companies have increased their plant facilities two, three and four times.

28. During the period 1950 to 1960, the population of the city and county of Philadelphia decreased from 2,071,605 in 1950 to 2,002,512 in 1960, but during the same period the population in the suburban areas increased from 850,865 to 1,632,716. WNAR now serves 452,451 of the suburban population. Operating as proposed, it will serve 1,504,280 of the present suburban population.

29. During the period 1954–1959, the number of farms in Montgomery County decreased from 2,505 in 1954 to 1,510 in 1959, with the result that in 1959, 35.4% of the area of Montgomery County was in farms. During the same period, the harvested crop land decreased from 87,312 acres in 1954 to 65,713 acres in 1959. A somewhat similar decrease in the number of farms and harvested crop lands also occurred in the adjoining counties of Bucks, Chester and Delaware.

30. While the number of farms and acreage devoted to crops in Montgomery, Bucks, Chester and Delaware has decreased in recent years, the number of manufacturing, wholesale and retail establishments has increased. The extent of the increase is shown in the tables below.

a. Statistics taken from the U.S. Bureau of the Census, Census of Manufacturers for 1947 and 1963, show, among other things, the number of manufacturing establishments and the number of employees of such establishments in Montgomery County and the adjoining counties of Bucks, Chester and Delaware. In statistical form, these data are summarized as follows:

Year	Montgomery County		Bucks County		Chester County		Delaware County	
	Establishments	Employees	Establishments	Employees	Establishments	Employees	Establishments	Employees
1963	1,111	82,229	586	35,123	355	25,784	482	53,492
1947	648	57,005	322	17,136	206	18,449	310	47,255

b. Retail and wholesale statistics concerning the number of establishments and the volume of their sales during certain specified years for the same four counties shown above are as follows:

[Dollars in thousands]

Year	Montgomery County		Bucks County		Chester County		Delaware County	
	Establishments	Sales	Establishments	Sales	Establishments	Sales	Establishments	Sales
RETAIL ESTABLISHMENTS AND SALES								
1963	4,684	$869,589	2,502	$432,414	1,777	$259,097	3,747	$663,301
1948	3,804	305,330	1,705	183,123	1,731	126,295	3,778	294,527
WHOLESALE ESTABLISHMENTS AND SALES								
1963	1,138	2,163,610	238	116,309	239	185,413	531	525,900
1954	537	317,577	132	61,985	158	93,371	335	174,865

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It will be noted that in 1963, 1,138 wholesale establishments in Montgomery County had sales of $2,163,610,000, thus establishing that this area has become a very large wholesale distributing point for the Philadelphia urbanized area.

COST OF CONSTRUCTION

31. The applicant proposes to remove the existing WNAR tower and erect three new towers, each having an overall height above ground of 228 feet. Both the existing and proposed tower array are on land owned by the applicant. The total estimated cost of construction is $53,500 of which approximately $10,000 represents cash costs which will be incurred during the first year of operation in completion of proposed construction. Approximately $43,500 of the total cost represents the purchase of equipment from Gates Radio Company which will extend credit to the applicant for the financing of this purchase. Under the Gates proposal, the down payment will be approximately $10,875 made at the time the order is placed. Additional payments totalling $10,875 (one-third of the balance) will become due during the first year. Thus, during the first year of operation, the applicant will need cash of approximately $31,750. The balance sheet of the applicant, as of the time the application was filed, showed current assets of $102,586 of which cash on hand and in bank amounted to $43,945. Of the total current liabilities of $125,797, notes payable to officers and accrued officers' salaries amounted to a total of $65,989.

WNAR REVENUES

32. During 1965 and 1966, the total gross income of Station WNAR was $267,040 and $306,740. In 1966, local revenue sales amounted to $236,727 whereas national and regional advertising amounted to $51,756, with incidental revenue of $18,257. This shows that in terms of statistics, approximately 77% of its revenue came from local sales whereas regional and national sales amounted to 17% and incidental revenues to approximately 6%. The same approximate percentages prevailed in 1965.

33. As shown above, total gross income of Station WNAR during the years 1965 and 1966 were $267,040 and $306,740, respectively. The net operating and other income for the same years were, respectively, $51,907 and $59,244. The depreciation charged in the two years was $4,655 and $4,642, respectively, leaving a net income, before payment of officers' salaries, of $47,252 and $54,602. From the above, it can be seen that the applicant corporation, by the simple expedient of curtailing or reducing sums paid to the officers, can finance the costs of the proposed improvement even though the station receives no significant increase in operating revenue when operating as proposed with 5 kw.

34. WNAR's national rates are generally higher than local rates. To illustrate, WNAR's national rate for 36 spots broadcast during a one-week period (Class "AA") is $11.55 per spot. The local rate for the same class of time for 36 spots for one week (one minute in duration) is $8.25. The national rate for 12 spots weekly for 26 weeks is $12.10. The

local rate for the same class of time (one minute in duration) is $9.20.

35. A list of the advertising accounts for the month of March, 1966, and the month of May, 1967, broken down into local, regional and national accounts and also by the name of the advertiser and the community in which the advertiser is located was received in evidence as WNAR Exhibit 13. This exhibit shows that in March, 1966, local advertising from firms and establishments, most of which are in Norristown, produced local sales in the amount of $18,016 whereas regional sales totalled $4,114 and advertised many products and services available in Norristown and adjoining areas as well as much of the United States. The breakdown for the month of May, 1967, shows local sales of $18,973, most of which came from firms located in or having outlets in Norristown. Regional sales amounted to $5,647 from the advertising of 14 separate organizations, including the Bell Telephone Company, two oil companies and two automobile companies. One of the regional advertisers on Station WNAR is the Continental Bank & Trust Company, a banking institution which has its main office in Philadelphia. There are, however, 13 branches of this bank in Montgomery County. Another national advertiser is Kinney Shoes. This company, however, has four retail outlets in Montgomery County and one in Bucks County. The account with the Ford Motor Company is a typical national account which is handled by the New York advertising agency. There are, however, regional and local elements of this advertising as Fords are sold by local agencies. The station lists most co-operative advertising as local because most of the negotiations are with the local merchants handling the products involved.

36. Mr. Bernard Brode, manager of Station WNAR, was born in Philadelphia. For the past 19 years, he has been associated with Station WNAR as sports director, program director, sales manager and since November, 1963, as general manager. He testified that the station does not now receive and does not expect to get any substantial share of national advertising budgets. This conclusion is based on the fact that most of the national advertising in the Philadelphia area is placed with Stations WCAU (CBS), WIBG (Storer), WIP (Metromedia), KYW (Westinghouse) and WFIL (Triangle Publications-Philadelphia Inquirer). Each of these stations serves substantally 100% of the Philadelphia metropolitan area, and in view of the type of competition generated by the nationally known organizations, Mr. Brode states that it would be ridiculous for Station WNAR to anticipate receiving any significant share of the national advertising dollars, no matter what format the station may adopt even with the substantial improvement in coverage sought in this proceeding.

37. The president of the licensee and the general manager of the station both testified that as a matter of basic financial policy the station owners cannot let the possibility of obtaining additional regional or national advertising detract from the licensee's ability to hold a large segment of station time for local sales. With improved coverage, the licensee hopes to get a larger share of the existing advertising budgets from local firms, such as a retail outlet in a regional shopping center,

a local distributor with co-operative money to spend, the local branch of a grocery chain, or an automobile dealer who hopes to attract people from distant areas into his showroom. If, in fact, the local advertiser receives more value, this fact will be reflected in higher rates on the assumption that the advertiser could afford the higher prices because of better coverage. It is also anticipated that the regional advertiser, such as soft drink distributors and banks, will find the station a more attractive buy as they will be getting greater exposure by using the station. While Station WNAR has a number of accounts of regional institutions, such as banks, it carries no advertising of such institutions which do not have a branch or outlet in Montgomery County. No advertising of products which are sold nation-wide, such as automobiles, soft drinks, etc., is carried if the product is not available for purchase in Montgomery County stores.

ASCERTAINMENT OF NEEDS OF AREAS TO BE GAINED

38. N. Joe Rahall, president, director and one-third owner of Norristown Broadcasting Company, Inc., is a resident of Beckley, West Virginia. In support of the need for the improved coverage of Station WNAR, Mr. Rahall states that the activities, problems and needs of Delaware, Bucks and Chester Counties are similar to Montgomery's and are related. This conclusion is based on the fact that the problems of the area are no respecters of the county and other political boundary lines. For example, if there is a school problem or juvenile delinquency problem in one county, it is a school or juvenile delinquency problem in all. Mr. Rahall personally made no formal study of the needs of the area. His conclusions are based on his observations made in visits in the area over the years. To meet the programming needs of this large area, he states that "We are going to do more of what we are doing and better."

39. Sam J. Rahall and Farris E. Rahall, officers and directors, each owning one-third of the stock, live in St. Petersburg, Florida. The extent to which either have visited Norristown and participated in the ascertainment of the needs of the area for the proposed programming is not shown in the evidence of record.

40. The applicant places its main reliance on the need for the enlarged service area and for the proposed programming on the testimony of its general manager, Bernard Brode. Mr. Brode was born in the city of Philadelphia and spent eight or nine years in the Philadelphia area. For the past 19 years, Mr. Brode has been with Station WNAR, first as sports director, program director, sales manager, and since 1963 as general manager of the station. He resides in Norristown. His long experience in the area, together with his personal contact with those persons and firms who have used the facilities of Station WNAR during the past several years, have given Mr. Brode personal knowledge as to the needs of the area and its population. It is based on these contacts rather than on a detailed survey that Mr. Brode testified, in part, as follows:

". . . We are part of the Philadelphia Metropolitan area. Many of the persons who live in and around Montgomery County commute into the city of Phila-

delphia. Others commute on the Turnpike to Bucks County, still others go south into Chester and Delaware County. Here the highways . . . and specifically the Schuylkill Expressway, becomes very important. Not only do the residents of the county commute to the other areas to work, but, in turn, they travel to these other areas to visit friends, to shop, and to participate in an endless variety of civic, social, and recreational activities. Since WNAR is part of this Urban-Suburban Community, we have to involve ourself in the larger area as well as in our purely local affairs in Norristown.

* * * * * * *

"Another example of the inter-relationship involves the school situation. A number of our listeners in the immediate area of Norristown and Central Montgomery County go to schools, or have children in school, outside the area. These include such schools as LaSalle High School, West Catholic High School, Chestnut Hill Academy, and others. There are also colleges outside our immediate area such as Haverford, Bryn Mawr, Swarthmore, Temple University, The University of Pennsylvania, which have many students from our area. The same situation acts in reverse—there are good schools in our immediate area such as Ursinus College and Gwynedd-Mercy Junior College. These schools attract students from all over the Metropolitan Area. In both cases of the schools in and out of our immediate area, we give information about their activities for the benefit of this larger group."

Mr. Brode gave numerous other examples of the interrelationship of the Norristown area with adjoining communities and the activities therein. He demonstrated a personal familiarity with the area served and to be served and indicated how and in what segments of the WNAR programming the needs and desires of the persons living in the various areas are being met.

WNAR PROGRAMMING

41. The transmitter of WNAR is located near the hub of the major highway net in the area under consideration. WNAR uses helicopter traffic reports to keep commuters and others informed of the flow of traffic, accidents and other important road information.

42. WNAR directs its programs and program services primarily to Norristown and Montgomery County. The adjoining communities in Bucks, Chester and Delaware Counties are also provided program service and public service announcements to publicize their local community activities but this is done on a secondary basis.

43. WNAR has two full-time newsmen on its staff plus a number of "stringer" correspondents. Approximately 60% of its newscasts are devoted to local and regional events, the remaining time being devoted to national and international news.

44. WNAR attempts to provide information and news of particular interest to the people residing in Montgomery County and the adjoining counties of Bucks, Chester and Delaware. This includes information relating to sports activities and local events and may be said to distinguish the WNAR programming from that provided by the numerous stations assigned to the city of Philadelphia.

45. For some 16 years, Station WNAR has had an "open mike" program described as a telephone discussion show. The listening audience is invited to call in and discuss a program desired by the caller. During the years, additional telephone lines have been added, one of

which goes into the Philadelphia area for persons wishing to call from that city. The "open mike" program is one which is believed to have broad appeal, particularly when such matters as the Salk and Sabin vaccines are discussed. Also of broad appeal are the income tax, social security and similar subjects for which arrangements are made by organizations in the four-county area which WNAR deems to be its primary service area.

46. WNAR's entertainment programs are basically music presentations interspersed with public service spot announcements and advertising. The station broadcasts religious services from numerous churches in Montgomery County in co-operation with the local Council of Churches. It has, however, no regularly scheduled program featuring churches or religious organizations other than those in Montgomery County.

47. WNAR's sports programs cover mainly events in schools located in Norristown, King of Prussia, Radnor and Worcester. The station seldom carries any sports program which does not directly involve a school in Montgomery County in contest with schools in the same county or with schools in adjoining counties.

48. Public service programs presently carried by the station involve reports from the county farm agents, superintendents of the various schools in Montgomery County, members of the local borough governments and town and county governments, members from the offices of social security, internal revenue, social welfare and health, of the Montgomery County Medical Society, of law enforcement officers, and programs or spot announcements promoting various fund drives, service club activities and organizational work. Most of these public service programs are centered around Norristown and Montgomery County activities. However, much of this service, such as spots on behalf of the Boy Scouts of America, the Easter Seal Society, the American Legion, and the National Safety Council, while directed to Montgomery County, also is of interest to and directed to any person within the service area of the station.

49. During the calendar year 1965, Station WNAR broadcast 11,331 public service spot announcements. Included were 1,142 spots relating to farm news in Montgomery, 921 spots (314 minutes) to the Montgomery County Medical Society, and 1,028 spots for the Norristown public library. In addition, the station devoted 17,902 minutes to broadcasting programs for numerous governmental, religious and public service organizations in the area. In 1966, the station broadcast 5,344 public service spot announcements and in addition devoted 17,796 minutes of time to promoting the activities of more than 600 separate community organizations of which the greater portion were organizations serving Norristown and environs. These 600 community organizations were scattered throughout the suburban area served by WNAR, including the counties which will be reached by the improved facilities.

50. The owners of Station WNAR state emphatically that if the pending application is granted, there will be no change in the basic character of its program service. In particular, they assert that the

WNAR program format will not be changed and will not be modified to meet the interests of persons residing to the east and south of the Delaware River in New Jersey. With the increased coverage, however, WNAR will become more involved in the activities in Delaware, Chester and Bucks Counties in the sense that it will give more information regarding civic events, activities and problems in these adjoining counties.

51. The licensee states that with the grant of this application, it will increase its news staff to accommodate the increased workload, but will maintain a minimum of approximately 60% of its news time to local and regional news, and if necessary will install new lines to accommodate listeners who may wish to participate in the WNAR "open mike" programs.

CONCLUSIONS

1. In this proceeding, Norristown Broadcasting Company, Inc., licensee of Class II Station WNAR, 1110 kc, 500 watts, nondirectional, daytime only, at Norristown, Pennsylvania, seeks a construction permit to increase power to 5 kw, 1 kw during critical hours, with a directional mode of operation. Directional operation is necessary to prevent radiation to the north in the direction of Station WGPA, Bethlehem, Pennsylvania, in order not to increase the objectionable interference to that station as well as to afford protection to other existing and proposed stations. The directional antenna utilizing the same theoretical parameters when operating with both 5 kw and 1 kw is designed to radiate maximum energy to the south through the center of Philadelphia. Except as indicated, Station WNAR will continue to operate as a Class II station on 1110 kc from its present transmitter site.

2. Norristown, site of Station WNAR, has a population of 38,925 persons. From the present and proposed site, Station WNAR now serves within its interference-free contour an area of 1,706 square miles within which there is a population of 1,309,018 persons. Of the 389,893 persons living within the present 5 mv/m contour, 117,000 persons reside within the city of Philadelphia, a figure which represents approximately 5.8% of the population of that city. Operating with power of 5 kw as proposed, Station WNAR will serve an interference-free area of 3,856 square miles within which there is a population of 3,912,324 persons. Of the 2,725,354 persons who will be within the 5 mv/m contour of the station, 1,845,326 persons reside in the city of Philadelphia, a figure which represents approximately 92.1% of the population of that city. During critical hours when the station proposes to operate with power of 1 kw, the 5 mv/m contour of Station WNAR will penetrate the city of Philadelphia and encompass a population of 446,000 persons, or approximately 22.2% of the population of that city.

3. Neither the 25 mv/m contour nor the 10 mv/m contour of the proposed operation will cover any part of the principal business area of the city of Philadelphia operating with either the proposed 5 kw or 1 kw power. As shown above, the 5 mv/m contour will not encompass

all of the city of Philadelphia. For these reasons, the proposed operation, were it for a classification as a Philadelphia station, would not be in compliance with the provisions of either Section 73.188(b)(1) or Section 73.188(b)(2) of the Commission's Rules.

4. The key and controlling issue in this proceeding is whether the proposal under consideration is to be realistically classified as a station serving Norristown and the adjoining area or one serving or seeking to serve the city of Philadelphia, Pennsylvania.

5. As the proposed 5 kw operation as well as the proposed 1 kw operation will increase substantially the penetration of the WNAR 5 mv/m contour over the city of Philadelphia, population, 2,002,512, such fact under the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 6 RR 2d 1901, 2 FCC 2d 190 (1965), petitions for reconsideration denied, 6 RR 2d 1908, 2 FCC 2d 866 (1966), creates a rebuttable presumption that the licensee proposes to serve Philadelphia rather than Norristown. The question in issue is whether the applicant has carried the burden of rebutting the presumption.

6. The *Policy Statement* reflects the fact that Commission experience has demonstrated that when suburban stations increase their coverage so as to serve within their 5 mv/m contours a substantial part of the central city of a metropolitan area, the licensees of such stations "often tend to seek out national and regional advertisers and to identify themselves with the entire metropolitan area rather than with the particular needs of their specified communities." Operating with 5 kw as proposed, Station WNAR will have within its 5 mv/m contour a total population of 2,725,354 persons of which 1,845,326 persons reside within the city of Philadelphia. Station WNAR will have within its 2 mv/m contour a population of 3,704,741, a figure which includes all of the 2,002,512 persons in the city of Philadelphia. In terms of statistics, it is clear that Station WNAR, operating as proposed, can and will place a signal over the city of Philadelphia which will be competitive with the signal of many Philadelphia stations. Under these conditions, it is necessary to assume that Station WNAR, operating with 5 kw as proposed and also with 1 kw during critical hours, may be attractive to national and regional advertisers as well as to the many businesses within the city of Philadelphia. As far as the end result is concerned, it is immaterial whether WNAR seeks advertising from such firms or whether such firms or advertising agencies seek service from WNAR.

7. The Commission's *Policy Statement*, *supra*, was an attempt to cope with two types of applications, first, the application of a person allegedly seeking to serve a suburban community but in reality expecting through one means or another to ultimately become a principal city station; and, second, the licensee who in good faith sought and obtained a license to serve a suburban community but who has found it difficult to resist the temptation to become the licensee of a substandard principal city station.

8. Subsequent to the issuance of the Commission's *Policy Statement*, several cases have been decided at the Commission level wherein the 5 mv/m contour of the proposed station penetrated the larger city, thus

creating the presumption that the applicant proposed to serve the larger city. These decisions, with particular reference to facts pertinent in this case, are summarized below.

9. In *KEZY Radio, Inc.*, 3 FCC 2d 407, 7 RR 2d 294, adopted April 6, 1966, the Commission authorized Station KEZY, Anaheim, California, to increase the daytime power from 1 kw to 5 kw-LS, despite the fact that with such power the 5 mv/m coverage over the city of Los Angeles would increase from 4.9% to approximately 11.1%. The Commission noted that Anaheim (population 104,184 persons) was located in Orange County, California (population 703,925 persons) and that KEZY was one of two radio stations in Orange County. The Commission held that these and other facts presented by the applicant overcame the presumption that the proposal was to serve the city of Los Angeles.

10. In *Clay Broadcasters, Inc.*, 4 FCC 2d 932, 8 RR 2d 687, adopted September 7, 1966, the Commission granted an application to construct a new Class II station at Liberty, Missouri, to operate on the frequency 1140 kc with 500 watts, daytime. The Commission noted that the applicant's proposed 5 mv/m contour would encompass a substantial portion of Kansas City, Missouri (475,539 persons), but the applicant proposed power of only 500 watts for the community of Liberty (8,909 persons); that the site selected for the transmitter was not located south of Liberty which would give better Kansas City coverage but southeast of Liberty where coverage over Clay County would be maximized; and that the advertising commitments submitted by the applicant showed that the bulk of its revenue would come from Liberty.

11. In *WTOW, Inc.*, 11 FCC 2d 277, adopted January 4, 1968, the Commission authorized Station WTOW, Towson, Maryland, to change its directional radiation pattern, so as to bring the applicant's present operation into compliance with Section 73.188(b)(1) of the Rules despite the fact that such change would increase applicant's 5 mv/m coverage over the city of Baltimore. The Commission noted that even though additional coverage would be obtained over Baltimore, the change in the directional pattern was required to provide service for portions of the surrounding Baltimore County which had not previously received service from the county's only standard broadcast station.

12. In *Monroeville Broadcasting Company, et al.*, adopted April 12, 1968 (FCC 68–404), the Commission granted the application of Monroeville Broadcasting Company for a permit to construct a new Class II station at Monroeville, Pennsylvania, to operate on 1510 kc with 250 watts power, daytime only, nondirectional, despite the fact that the 5 mv/m contour would penetrate the geographical boundaries of the city of Pittsburgh by 0.6 of a mile within an area of 0.25 square mile, encompassing 2,256 persons or approximately 0.37% of the population of Pittsburgh (604,332 persons). In the same decision, the Commission denied the application of Miners Broadcasting Service, Inc. to change the facilities of Station WMBA, Class III, 1460 kc, 500 watts, at Ambridge, Pennsylvania, to a Class II station operating on 1510 kc with

power of 10 kw, utilizing a directional antenna with dual city identification as Ambridge-Aliquippa, Pennsylvania. Whereas the present directional pattern of Station WMBA was away from Pittsburgh, the proposed directional pattern was toward the city of Pittsburgh and WMBA's proposed 5 mv/m contour would penetrate the city for a distance of 3 miles encompassing an area of 11 square miles within which there are 83,100 persons or approximately 13.8% of Pittsburgh's total population and that the 2 mv/m contour of the proposed operation would include 592,245 persons or approximately 98% of the 604,332 residents of Pittsburgh. The Commission held that WMBA had failed to rebut the presumption that the proposal was not one for a substandard Pittsburgh station.

13. In *The Tidewater Broadcasting Company, Incorporated, et al.*, adopted April 12, 1968 (FCC 68–405), the Commission denied the two applications in that comparative hearing, holding that neither of the applicants had failed to rebut the presumption that its proposal was, in reality, one for a substandard service to the city of Norfolk, Virginia. The Tidewater applicant proposed a Class II station to operate on the frequency 940 kc with power of 10 kw, daytime only, using a nondirectional antenna at Smithfield, Virginia. Smithfield had a 1960 population of 917 persons, which had been increased through annexation to approximately 3,000 persons; Smithfield is the largest community in the Isle of Wight County which had a total population of 17,164 persons. The proposed Tidewater 5 mv/m contour would encompass part of the city of Norfolk and the station operating as proposed would provide a 2 mv/m service to an urban population in excess of 736,000 persons, including all of the Newport News-Hampton and the Norfolk-Portsmouth urbanized areas as well as the cities of Suffolk and Virginia Beach. The second applicant, Edwin R. Fischer, originally requested a station for Newport News, Virginia, to operate on the frequency 940 kc with power of 10 kw, daytime only, using a nondirectional antenna. Fischer originally filed for Newport News, contending that this city had need for an additional standard broadcast station, but when confronted with the *Policy Statement* changed his proposal to a new station to serve Norfolk despite the fact that the proposal would not cover the city of Norfolk with signal intensities required by the Commission's Rules. While denying both applications, the Commission held that the provisions of Section 1.519 of the Commission's Rules prohibiting repetitious applications should be waived to permit each party to file new applications which will demonstrate that they are realistically designed to serve the needs of their respective communities, pointing out that the applicants may specify different sites and they may reduce their power.

14. The Commission's *Policy Statement* and the several decisions summarized above establish that great weight is to be placed upon the objective facts of (1) transmitter location, (2) power, (3) mode of operation, i.e., directional or nondirectional, and (4) coverage and population to be served.

15. In the instant case, the selection of the antenna site for the proposed station and the use of a directional array are dictated by the fact that any move to the north without the use of a directional antenna

would increase the objectionable interference to adjacent channel Station WGPA, 1100 kc, Bethlehem, Pennsylvania, and any move to the south, nondirectional, would increase the signal penetration into the city of Philadelphia. Any improvement in the operational facilities of Station WNAR requires the use of a directional antenna system to protect Station WGPA, Bethlehem, as well as other existing and proposed stations. Furthermore, the use of a directional array will enable Station WNAR to gain substantial areas lying to the east and west of Norristown along the Pennsylvania Turnpike and to the southeast and southwest of the city and county of Philadelphia. These objective facts in the light of the Commission's decision in *WTOW, Inc., supra*, rebut the presumption that the site and antenna array were selected with the intent of becoming a central city (Philadelphia) station.

16. WNAR proposes to use 5 kw, day, reducing to 1 kw during critical hours. WNAR, operating with power of 500 watts, now serves within its 5 mv/m and 2 mv/m contours 117,000 and 507,000 persons, respectively, in the city of Philadelphia. Operating with 5 kw as proposed, Station WNAR will have within its 5 mv/m contour 1,845,326 persons or 92.1% of the population of Philadelphia whereas all of the city of Philadelphia will be within the 2 mv/m contour. During critical hours, when operating with power of 1 kw, the 5 mv/m contour will encompass 446,000 persons or 22.2% of the population of Philadelphia and the 2 mv/m contour will serve 1,940,000 or 96.9% of the population of Philadelphia. The Hearing Examiner assumes that the present proposed directional array could be easily modified so that Station WNAR operating with power of 1 kw would serve areas to the north along the Pennsylvania Turnpike, and to the southeast and southwest of Philadelphia substantially as depicted in the engineering exhibits for the 5 kw operation. It is doubtful, however, that such operation would limit to any appreciable extent the coverage over the city of Philadelphia. Hence, proposing to operate with power of 1 kw, WNAR would be confronted with the presumption of proposing a substandard central city (Philadelphia) station which would not be as efficient as the 5 kw operation. In considering the use of 5 kw vs. 1 kw, it should be noted that of the 11 standard broadcast stations now assigned to the city of Philadelphia, only two (Station WFLN, 900 kc, 1 kw, DA-D, and Station WHAT, 1340 kc, 1 kw-D/0.25 kw-N) operate with less than 5 kw power. Furthermore, of the four Philadelphia stations which operate with 5 kw power during the day, three operate on frequencies substantially lower than the 1110 kc assigned to Station WNAR. The Hearing Examiner finds that the objective facts here stated rebut the presumption that the use of 5 kw power was for the purpose of establishing a substandard Philadelphia station (see *WTOW, Inc., supra*, cf. *Monroeville Broadcasting Company, supra*, as applied to the WMBA application and two applications in *The Tidewater Broadcasting Company, Incorporated, et al., supra*).

17. Station WNAR proposes to reduce power from 5 kw to 1 kw during critical hours. This reduction in power, using the same antenna pattern for both 5 kw and 1 kw, means that the station, during critical hours, will no longer serve limited areas and populations in

portions of Montgomery, Berks, Chester and Bucks Counties. For details, see paragraphs 11, 16 and 20 of the basic findings. The Hearing Examiner assumes, however, that it will be a relatively simple matter to design an array so that when operating with 1 kw, the radiation to the north, to the east and west along the Pennsylvania Turnpike and to the southeast and southwest of the city of Philadelphia would be such that during critical hours the station would serve substantially the same areas in these general directions as when operating with power of 5 kw. Should this come to pass, the station would lose little, if any, of the areas and populations now served.

18. The Hearing Examiner's gratuitous comments on the possibility of adjusting the parameters of the 1 kw operation during critical hours as indicated in the preceding paragraph are prompted by the fact that (1) such operation would make a more efficient use of the frequency 1110 kc than now proposed, (2) no interference would be caused to any existing or proposed station, (3) no issue not already covered by an extensive evidentiary record would be involved, (4) the applicant has been trying to improve the facilities of Station WNAR for several years, and (5) the Commission in paragraphs 19 and 20 of the decision in *The Tidewater Broadcasting Company, Incorporated, et al.*, took affirmative action which would enable the two applicants in that proceeding to propose stations which would not create the central city presumption enunciated in the *Policy Statement.*

19. The cost of the proposal here under consideration is $53,500 of which approximately $43,500 represents the cost of equipment to be purchased from the supplier under a contract providing for payment over an extended period of time. As shown in the basic findings, the applicant corporation, by the simple expedient of curtailing the salary of its owner-officers, can finance the costs of the proposed improvements even though the station receives no significant increase in station operating revenues.

20. The applicant asserts that it does not intend to seek advertising as a Philadelphia station because, first, it does not wish to lose the Norristown and Montgomery County advertisers who furnish the major portion of the financial support of the station and, secondly, that attempting to compete for Philadelphia advertising with the four 50 kw Philadelphia stations as well as with the other stations assigned to that city would be expensive and in the end not worth the time and effort.

21. Station WNAR, when operating as proposed with power of 5 kw, will render primary service to a population of 3,912,324 persons, including all of the 2,002,512 residents of the city of Philadelphia. The signal which Station WNAR will put over the city of Philadelphia is of such intensity that it will compete with Philadelphia stations for the Philadelphia listening audience. One would be naive to assume that advertising agencies will not bring such facts to the attention of their clients who may find that Station WNAR may be a "good buy" to promote Philadelphia and other non-Norristown businesses and activities. The applicant does not anticipate that operating with the proposed improved facilities will result in any substantial in-

crease in the amount of Philadelphia, national and regional advertising revenue. The realistic question is whether such advertising will go to the station and if so whether it will cause the station to tend to identify itself with the entire Philadelphia metropolitan area rather than with the particular needs of Norristown and its environs.

22. The Norristown area, served by three railroads and strategically located with respect to high speed limited access turnpikes, is an area which is attractive to manufacturing and other business activities. There are now in Montgomery County more than 1,100 manufacturing establishments, more than 1,100 wholesale establishments and more than 4,600 retail establishments, the latter having sales of more than $869,500,000 during the year 1963. These and other statistics given in the basic findings establish unquestionably that Montgomery County, of which Norristown is the hub, is a manufacturing and industrial area in and of itself.

23. The presumption that with a competitive signal in Philadelphia Station WNAR may become a Philadelphia station for Philadelphia business is rebutted by the fact that most of the Philadelphia AM advertising dollars now go to the 11 existing Philadelphia stations whose power and hours of operation make them a logical choice for most firms seeking to reach the Philadelphia audience. There is little room for expansion in the city of Philadelphia which, in fact, lost population between 1950 and 1960. Norristown, on the other hand, is the hub of a growing residential, business and industrial area. In Montgomery County and in the adjoining counties of Bucks, Chester and Delaware, there is room for economic growth, room for the construction of roads, factories, homes, apartments, shopping centers, schools and recreational facilities which can be built without the agonies of redevelopment which must precede the establishment of new and improved facilities within the city of Philadelphia. Operating as proposed, Station WNAR will serve an area with a sound economic base, an area which will continue to attract residents, business activities and those who may seek recreation and entertainment. The present and potential business activities of the Norristown area are such that Station WNAR can rely on this area for the major portion of its advertising support, thereby enabling the station to resist overtures from Philadelphia-based advertisers.

24. In a public notice released February 28, 1968, the Commission announced that in a letter dated February 21, 1968, addressed to the licensee of Station WGCM, Gulfport, Mississippi, said licensee was advised that under the facts then known to the Commission the stated policy of Station WGCM of refusing to accept advertising from automobile dealers located outside the immediate vicinity of the station is contrary to the public interest and requested the licensee to modify its practices in this particular. The Commission noted that the policy was initiated after the licensee was told by local dealers that advertising by New Orleans, Louisiana, agencies would create a hardship to the local industry, and following contact with local dealers, the station had cancelled a contract with the New Orleans advertising agency pursuant to which Station WGCM was to broad-

cast advertising on behalf of a Bay St. Louis automobile agency. A licensee, however, is not required to accept all advertising offered and, in the interest of furnishing a balanced programming service, must, of necessity, determine how much of the broadcast day can be devoted to advertising. There does not appear to be any legal or other reason why a licensee cannot adopt a nondiscriminatory policy of limiting the amount of outside advertising so that it could devote a greater portion of its advertising time to the needs of the merchants and business activities located within and near the community it is licensed to serve. Under the circumstances, the Hearing Examiner assumes that it is and will be within the power of the licensee of WNAR to adopt a policy pursuant to which the greater portion of its advertising time will be reserved for Norristown merchants and businesses to the end that the station can and will remain a Norristown rather than a Philadelphia station.

25. The Bureau emphasizes that the applicant did not gather any survey data and made no meaningful survey to establish what specific unsatisfied needs exist in the areas and populations to be gained by the proposed operation. The Bureau also contends that the applicant failed to ascertain and consider what existing stations are doing to meet the needs and interests of the citizens of the areas to be gained, hence, failed to establish that there are any unsatisfied needs and interests which would be served by the proposed operation.

26. One would be naive, indeed, to assume that from the 2,602,256 persons to be gained by the proposed 5 kw operation, the applicant could not find hundreds, possibly thousands, of people who could claim that their personal needs or the needs of the organizations with which they may be affiliated are not being given adequate radio time by the existing stations assigned to Philadelphia and the contiguous counties. It is also likely that many witnesses could have been called to testify as to what the numerous stations serving the Philadelphia area are not doing which the proposed station could do. It is debatable, however, whether such testimony in the absence of a careful statistical analysis of the programs and program logs of the numerous stations referred to would have any greater probative value than the tale told by an idiot which is said to have been "full of sound and fury, signifying nothing." In the absence of evidentiary proof to the contrary, the Hearing Examiner assumes, for the purposes of this Initial Decision, that all of the stations assigned to Philadelphia and the contiguous communities are operating in the public interest and in so doing give appropriate amount of air time to the numerous activities which occur within their service areas.

27. In 1965, Station WNAR broadcast 11,331 public service spot announcements of which number 1,142 related to farm news in Montgomery County, 921 dealt with the Montgomery County Medical Society and 1,028 promoted the Norristown public library. In 1966, the last full year of operation before this application went to hearing, Station WNAR broadcast 5,344 public service spot announcements and devoted 17,796 minutes of air time to promoting the activities of more than 600 separate community organizations of which the greater number were organizations serving Norristown and adjoining

communities. It must be assumed that these 600 odd organizations would not have used the facilities of Station WNAR had there not been a need for such use.

28. The applicant's present and proposed program policies and programming are based on the knowledge obtained in operating Station WNAR for the past 20 years and the day-to-day contact with business firms advertising on the station and the numerous governmental, civic, charitable and public service organizations which have used the facilities of Station WNAR in the manner indicated in the next preceding paragraph. In addition, great reliance has been placed on the interests of the listening audience as evidenced on the "open mike" telephone discussion program during the past 16 years.

29. While Mr. N. Joe Rahall's statement that if this application is granted "We are going to do more of what we are doing and better" may be an oversimplification of the proposals for the future, it, nevertheless, condenses in one short simple sentence pride in past performance and a desire to have his proposals for the future judged on the basis of such performance. With few exceptions, if any, the most persuasive evidence offered in an application for the renewal of a station's license or for improvements in the station's facilities is the past record of the station. See *Naugatuck Valley Service, Inc. (WOWW)*, 8 FCC 2d 755, 779; 10 RR 2d 737, 762. The record of Station WNAR, summarized herein, reflects a knowledge of the area served and to be served. The record is persuasive on the matter of the applicant's familiarity with the areas to be gained and the type of programming which will be responsive to the needs and desires of the persons residing therein. It is also persuasive of the fact that in the past years, Station WNAR has considered Norristown and the adjacent areas to be its primary service area despite its present coverage of a substantial part of the city of Philadelphia. It also warrants the conclusion that reliance may be placed on the assurance of the licensee that if this application is granted, Station WNAR will continue to consider Norristown and the immediate surrounding area as its primary service area.

30. Station WNAR has been owned and operated by the Rahall brothers since 1946. The amount and type of public service broadcasting on behalf of numerous civic organizations previously referred to herein demonstrates that the owners were aware of their duties and responsibilities to serve the community to which the station is assigned. The station now serves a population of 1,328,911 persons of which 507,000 are residents of the city of Philadelphia; yet better than 75% of its broadcasting revenue comes from local advertisers. This fact, together with the sound economic base of Norristown, Montgomery County and the adjoining counties of Bucks, Chester and Delaware, warrant the conclusion that the station can continue to obtain the greater portion of its advertising support from local business firms and activities and not rely to any substantial extent upon Philadelphia-based advertising. The 22-year record of service of this applicant warrants giving great weight to the clear and unequivocal statements of the owners that they do not intend that Station WNAR become a Philadelphia station, but on the contrary, intend

it to remain a Norristown station serving Norristown and adjacent areas in Montgomery, Bucks, Chester and Delaware Counties.

31. A careful consideration of all the facts of record, summarized in the foregoing findings and conclusions, warrants the conclusion that the applicant has rebutted the presumption that Station WNAR, operating as proposed, will be a substandard Philadelphia station rather than a Norristown station. This, in turn, leads to the ultimate conclusion that the public interest, convenience and necessity will be served by granting the application of Norristown Broadcasting Company, Inc.

IT IS ORDERED that unless an appeal to the Commission from this Initial Decision is taken by any of the parties or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Norristown Broadcasting Company, Inc., licensee of Class II Station WNAR, 1110 kc, 500 watts, nondirectional, daytime only, at Norristown, Pennsylvania, for a construction permit to increase power to 5 kw, 1 kw during critical hours, with a directional mode of operation, BE and the same IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BASIL P. COOPER, *Hearing Examiner.*

F.C.C. 73-590

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 74, SUBPART H, OF THE COMMISSION'S RULES AND REGULATIONS ON TELEVISION BROADCAST BOOSTER STATIONS	Docket No. 19756

NOTICE OF PROPOSED RULEMAKING

(Adopted May 31, 1973; Released June 5, 1973)

BY THE COMMISSION:

1. As a result of our Task Force study on re-regulation of broadcasting, the Commission has under consideration the matter of deleting Subpart H, concerning Television Broadcast Booster Stations, Part 74 of our Rules and Regulations.

2. Such stations are essentially co-channel amplifying transmitters by which the licensee of a UHF TV broadcast station may boost its signal where it is of low intensity within the station's theoretical Grade A contour.[1] Power is limited to that which is necessary for an adequate signal over the area to be served by the booster, but, in no event, is to exceed an effective radiated power of 5 kilowatts peak visual. A TV booster must be for direct reception by the public. It may not be used for a point-to-point relay system.

3. Rules implementing the service of television broadcast booster stations were promulgated by Report and Order in Docket No. 11331, adopted May 20, 1960. 20 Pike and Fischer R.R. 1505.

4. Since that time, only two such booster stations have been authorized (construction permits), i.e. to WINR-TV (now WICZ-TV), Binghamton, N.Y., on September 20, 1960 (BPTB-1); and to KLYD-TV (now KJTV), Bakersfield, California on December 1, 1961 (BPTB-2). Neither was ever licensed. Each was cancelled at the request of the permittee after two-and-one-half months.

5. Lack of interest in or utilization of this service appears to have resulted from at least two practical considerations: First, inherent in the co-channel operation of TV boosters are technical difficulties of avoiding undesirable interference. Second, the use of TV translators has been a satisfactory and preferable alternative.

6. Our experience with the television broadcast booster service indicates that it has served no useful purpose, and in view of the attendant interference problems, we conclude that the rules should be reviewed for possible deletion. There have been no applications filed in this

[1] The radius of such Grade A contour is specified as 68 miles on hypothetical assumptions of operation with an effective radiated power of 5000 kilowatts from an antenna 2000 feet above average terrain and over a transmission path of normal terrain.

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service for 12 years. There are no stations presently authorized under this subpart. None has ever been licensed. Moreover, because conventional translators are available, it appears unlikely that there will be any requests for television booster stations in the future.

7. Subpart G, Television Broadcast Translator Stations, Part 74, provides for boosters of UHF translator stations. There are nine such UHF translator signal boosters currently licensed. This proceeding does not, of course, affect the Subpart G booster operations.

8. Pursuant to authority contained in Sections 4(i) and 303 of the Communications Act of 1934, as amended, IT IS PROPOSED TO AMEND Part 74 by deleting the provisions of Subpart H in their entirety and designating it as Reserved.

9. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested parties may file comments on or before July 16, 1973, and reply comments on or before July 26, 1973. All relevant and timely comments will be considered by the Commission before final action is taken. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this Notice.

10. In accordance with the provisions of Section 1.415 of the Rules, an original and 14 copies of all comments, replies, pleadings, briefs and other documents shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C. (1919 M Street, N.W.).

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*